TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 513

WILLIE NORVELL, PETITIONER,

vs.

ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED AUGUST 22, 1962
CERTIORARI GRANTED OCTOBER 15, 1962

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INDEX

[fols. a-b] [Caption omitted]

[fol. c] [File endorsement omitted]

IN THE SUPREME COURT OF ILLINOIS

No. 36830

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Defendant in Error,

vs.

WILLIE NORVELL, Defendant-Plaintiff in Error

WRIT OF ERROR TO THE CRIMINAL COURT OF COOK COUNTY

Honorable Edgar A. Jonas and Richard B. Austin, Judges Presiding

Abstract of Record from Criminal Court of Cook County
—Filed January 12, 1962

Thomas P. Sullivan, Robert E. Pfaff, 135 S. LaSalle Street, Chicago 3, Illinois, Attorneys for plaintiff in error, Willie Norvell.

[fol. 1] PROCEEDINGS

Placita

Indictment for murder, No. 41-1473, returned by Grand Jury of Cook County on September 22, 1941.

Count 1 of indictment against Edgar Shepard, James Norvell and Willie Norvell, alleging that on August 17, 1941 the defendants murdered Michael Hetman by striking him on the head and neck with a club.

Count 2 of indictment against same defendants alleging that on August 17, 1941 they murdered Michael Hetman by striking him.

Docket entry September 25, 1941: Defendant Willie Norvell arraigned. Plea of not guilty entered by defend-

ant Willie Norvell. Case assigned to Hon. Edgar A. Jonas for trial.

Motion and order for Behavior Clinic examination of defendant Willie Norvell, dated September 25, 1941.

Docket entry October 29, 1941: Defendant Willie Norvell waives jury trial. Trial begun and testimony of witnesses heard. Case continued to October 30, 1941. Age of defendant Willie Norvell is [illegible] years.

[fol. 2] Docket entry October 30, 1941: Further testimony of witnesses heard. Cause continued to November 3, 1941.

Docket entry November 3, 1941: Court finds defendant Willie Norvell guilty of murder as charged in the indictment. Defendant Willie Norvell's motions for new trial and arrest of judgment denied and exceptions taken. Judgment entered on finding of guilty. Defendant Willie Norvell sentenced to a term of 199 years of confinement at hard labor in the Illinois State Penitentiary. Defendant Willie Norvell's motion for allowance of 90 days' time in which to prepare and file his bill of exceptions allowed.

Docket entry September 11, 1952: Defendant Willie Norvell moves the Court for records in the cause. Motion continued to September 29, 1952.

Docket entry September 29, 1952: Defendant's motion for records denied by Judge Joseph A. Graber.

Order entered December 4, 1956 by Judge Wilbert F. Crowley:

Upon the verified Petition of Willie Norvell filed pursuant to Supreme Court Rule 65-1(2), the Court being fully advised in the premises, Finds:

> [fol. 3] (a) That the petitioner was at the time of his conviction and is now without financial means to pay for the cost of a stenographic transcript of the proceedings at his trial, and
>
> (b) That a stenographic transcript of the proceedings at his trial is necessary to present fully the errors recited in the petition.

It Is Therefore Ordered:

1. That the Official Shorthand Reporter of this Court forthwith transcribe an original and a copy of all of the

notes taken of the proceedings in the above-entitled cause, Indictment No. 41-1473;

2. That the Official Shorthand Reporter of this Court shall deliver the original and a copy of said transcript to Willie Norvell without cost within a reasonable time.

Order entered December 27, 1956 by Judge Crowley, defendant's motion for common law record allowed.

Order entered March 18, 1958 by Judge Harold P. O'Connell, defendant's motion for writ of mandamus denied.

Docket entry March 24, 1961: Bill of exceptions signed, certified and sealed by Judge Richard B. Austin and ordered filed instanter.

Court reporter Gerald Healy's certificate of compliance, filed March 24, 1961:

[fol. 4] I, Gerald J. Healy, Official Shorthand Reporter of the Criminal Court of Cook County, Illinois, do hereby state that on the 24th day of March, A.D. 1961 that portion of the original Bill of Exceptions in the above entitled cause, as transcribed by me, was filed with the Clerk of this Court; that on the 24th day of March, 1961, a copy of said Bill of Exceptions was delivered to the attorney for the defendant, Robert E. Pfaff, 135 South LaSalle St., Chicago, Ill. which was done pursuant to order of the Chief Justice of the Criminal Court of Cook County.

Notices of motion, filed June 15, 1961.

Defendant Willie Norvell's motion filed June 15, 1961:

Now comes defendant Willie Norvell, by Thomas P. Sullivan and Robert E. Pfaff, his attorneys, and moves that this Court enter its order

(1) Fixing a date for hearing to the end that the stenographic transcript of the trial of this cause may be procured if the official court reporter's shorthand notes are still in existence and can be transcribed or, if said notes are not in existence or cannot be transcribed, that an adequate and complete narrative bill of exceptions may be constructed; or

[fol. 5] (2) If upon such hearing it is found either (a) that it is impossible to procure a stenographic transcript of the trial of this cause; or (b) that an adequate and complete narrative bill of exceptions cannot be constructed, then in that event, vacating the judgment of conviction and sentence

entered upon said judgment, heretofore entered in this cause on November 3, 1941, and granting defendant a new trial in this cause.

In support of the foregoing motion defendant states:

1. On September 22, 1941, defendant was indicted by the Grand Jury in and for Cook County, Illinois, for the crime of murder, Indictment No. 41-1473.

2. Thereafter, on October 27, 28, 29 and 30, 1941 and November 3, 1941, defendant was tried for the aforesaid crime in this Court, before the Honorable Edgar A. Jonas, sitting without a jury.

3. The Official Court Reporters who took shorthand notes of the proceedings on the various days at the aforesaid trial are the following:

October 27, 28, 29, 1941	—E. M. Allen and Margaret Meek
October 30, 1941	—Gerald J. Healy
November 3, 1941	—E. M. Allen and Gerald J. Healy

[fol. 6] 4. At the time of his trial and continuing to the present time, defendant was and is without funds with which to purchase a transcript of the report of proceedings (or bill of exceptions) of his trial. Since the time of the entry of the conviction on November 3, 1941, defendant has been incarcerated in the Illinois State Penitentiary.

5. On November 29, 1956, defendant filed a petition in this Court pursuant to Rule 65-1(2) of the Rules of the Supreme Court of Illinois, requesting that he be supplied, without cost, a copy of the report of proceedings at his trial. On December 4, 1956, said petition was granted by the Honorable Wilbert F. Crowley.

6. Defendant and his counsel have obtained a copy of the report of proceedings of that portion of his trial for which Gerald J. Healy served as Official Court Reporter, but defendant and his counsel have been unable to procure a copy of the report of proceedings of the balance of defendant's trial.

7. E. M. Allen and Margaret Meek, the Official Court Reporters who attended portions of defendant's trial, are both deceased, Mr. Allen having died August 26, 1949 and Miss Meek on November 9, 1953.

[fol. 7] Wherefore, defendant prays the entry of an order as aforesaid.

Verified by Robert E. Pfaff on June 2, 1961.

Docket entry June 29, 1961: Hearing on motion for transcript of reporter's notes or narrative bill of exceptions. Case continued to July 18, 1961.

Docket entry July 18, 1961: Hearing on motion for transcript of reporter's notes or narrative bill of exceptions. Case continued to August 1, 1961.

Order entered August 1, 1961 by Judge Austin:

This cause came on for hearing on the motion of defendant filed June 15, 1961. The Court has heard and considered the evidence introduced by the parties.

It is ordered that defendant Willie Norvell's motion for new trial is denied.

It is further ordered that the official court reporters who took notes of the hearings in this case on June 29, 1961, July 18, 1961, and August 1, 1961, shall forthwith transcribe an [fol. 7a] original and a copy of said notes, without cost to defendant, and shall file the original with the Clerk of this Court, and transmit the copy to defendant's attorney Thomas P. Sullivan, 135 S. LaSalle Street, Chicago, Illinois; provided that said transcript shall include only (i) the testimony of witnesses, (ii) motions and objections with respect to testimony of witnesses, and (iii) stipulations.

Writ of error No. 2944 from Supreme Court of Illinois, filed September 18, 1961.

Order entered by Hon. Walter V. Schaefer of Supreme Court of Illinois on October 3, 1961, excusing defendant Willie Norvell from filing a petition for writ of error, directing the Clerk of the Supreme Court to place the writ of error on regular docket, and to assign a regular docket number to the case, and extending time for defendant to file record on appeal to November 15, 1961.

Order entered by Judge Drucker on November 3, 1961, time for defendant Willie Norvell to obtain certification [fol. 8] of report of proceedings extended to and including December 9, 1961.

Order entered by Judge Drucker December 8, 1961, report of proceedings and Petitioner's Exhibit 1 certified, approved and ordered filed instanter.

Report of proceedings held before Hon. Edgar A. Jonas.
David L. Leeds, Assistant State's Attorney.
Herman Aschen for defendant Edgar Shepard.
Claude Holman for defendants Willie and James Norvell.
Reporter's Note:

This Bill of Exceptions is not in any way to be considered as a complete record of the proceedings had in this cause. Mr. E. M. Allen and Miss Margaret Meek, the official Reporters who reported all of the proceedings on October 27th, 28th and 29th, 1941, have both passed away, Mr. Allen on August 26th, 1949, and Miss Meek on November 9th, 1953.

The transcript for October 30th, 1941, taken by Mr. Healy, is complete for that date.

The transcript for November 3rd, 1941, contains only that portion reported by Mr. Healy. The proceedings reported by Mr. Allen, of course, are not available.

/s/ Gerald J. Healy.

[fol. 9] HEARINGS BEFORE JUDGE JONAS—October 30, 1941

EVIDENCE ON BEHALF OF DEFENDANT

RUBY LEE NORVELL, a witness called by defendants James and Willie Norvell, testified as follows:

Direct examination.

By Mr. Holman:

My name is Ruby Lee Norvell. I am a sister-in-law of Willie Norvell. I married one of his brothers. Edgar Shepard is my brother. I live at 1958 Hubbard Street, in the rear. I have known Willie Norvell for six years. I have had occasion to visit at his house. I visit there right along.

I have seen Willie Norvell quite often during the past six years, probably most every day. I have had occasion to observe him and to see how he acts at different times. I have been staying at their house now about a year.

I have observed Willie Norvell when he slept. When we tried to wake him up, the only way we could get him out of bed would be to call Bertha or Alice, somebody's name. Then he jumps and runs all the way through the house and he comes back to bed. He said, "Now, what is the use of coming in the house if they don't see us." He would get up and lay back down and get up and run back through the house.

He said his head bothered him a lot and his eyes. Some-[fol. 10] times he looked all right and again he didn't. When he didn't look all right, sometimes he would be real quiet. When he would be different, all at once he would jump up and cause a disturbance. He would eat a lot of sugar.

I saw him after an explosion took place. When I would speak to him I would say, "Hello, what is wrong with you?" He said, "I don't know, I haven't did nothing." And I said, "I just asked you." He said, "Nothing."

I was with Willie until about 2:30 on August 17th. I fix the fact that it was on the 17th instead of some other Sunday because on the 16th Willie and his wife brought James home from the hospital, and my husband just got his car

out of the shop. James got out of the hospital on August 16th and the next day was August 17th.

At 2:30 Willie and his wife walked up, and they went to see his grandmother. Around three o'clock we all got in the car and went out riding. At first we went to Carroll Avenue and got the suit James has on now from a lady over there. First he thought he was wanted at home but he didn't want to go home right then. He left me between 7:30 and 8 o'clock. Willie and his wife and grand-[fol. 11] mother left and went to 40th and State Street on the south side.

From my observations of Willie Norvell, I have an opinion as to whether or not he is sane or insane. In my opinion he is insane.

Cross-examination.

By Mr. Leeds:

I am 18 years old and have been married about two years. I live in the same apartment building the Norvell family lives in. They live in front and I live in the back.

I was born in Laramie, Mississippi and have been in Chicago all my life. My education consists of grade 2B at McKinley High.

I was home the night the police attempted to arrest Willie Norvell on September 17th. I don't know what Willie Norvell did with respect to jumping out of one window into another, because the police officers had us down stairs.

I saw Willie Norvell at 2:30 on August 17th. He stayed with me until 7:30 or 8 o'clock. Edgar Shepard was with me all day until 8 o'clock. When I left the house he was talking to Mr. Jessie and James was there until then. This was 8 o'clock. James was asleep on the day bed.

When Willie is asleep and you tried to wake him up [fol. 12] and go in and yell and call like "Bertha" or "Alice", a girl's name. That is the name of a girl he used to go with. He jumps out of bed and runs all the way around the house two or three times and jumps back in bed and jumps up.

Willie told me he was in grade 8-B in school.

Q. Have you an opinion as to whether Willie Norvell was able to distinguish between right or wrong on August 17th, 1941?

Mr. Holman: I object.
The Court: She may answer.
The Witness: A. I wouldn't know.

Redirect examination.

By Mr. Holman:

I went to 2-B in high school.

Q. You feel that you are able to tell when a person is crazy and not crazy?

A. Yes.

Mr. Leeds: I object.
The Court: Objection sustained. Strike it out.
Mr. Holman: Q. Are you able to have an opinion as to whether or not a person is sane or insane?

A. Yes.

Mr. Leeds: I object.
The Court: The same ruling. Strike.
[fol. 13] Mr. Holman: Q. He was showing those peculiar antics by jumping in the bed?

The Court: Reframe the question so you will incorporate the testimony.

Mr. Holman: Q. The state's attorney asked you about some peculiar things what Willie did in regard to when he was asleep in the bed. You remember that question, do you?

A. Yes.

Q. Have you ever seen any normal person, that you had an opinion was normal, carry on like that?

A. No sir.

Mr. Leeds: I object.
The Court: Objection sustained.

When the police came to arrest Willie, I was home in bed. The police had us down stairs. They arrested my husband and me and took us down to the station. We had not done anything.

HANNA DAVIS, a witness called by defendants James and Willie Norvell, testified as follows:

Direct examination.

By Mr. Holman:

My name is Hanna Davis. My address is 447 N. Damen Avenue. I have known Willie and James Norvell since they were small kids. I am related to them by marriage. I have had occasion to observe them during their life-[fol. 14] time.

Willie Norvel suffered from the disease of rickets when he was small. When you would stand him up, he would stand and quiver. He had rickets about 5 or 6 months.

He had trouble with his eyes. It was caused by an explosion of a gun into his eyes. After that he acted real funny. This happened over a period of 5 or 6 months, I think.

He had fits over a period of 6 years. For 5 months they had to put spoons into his mouth to keep him from eating up his tongue.

He used to run away from home and sleep under the steps. They had to go out and get him and bring him back and he would leave again. It would be real cold when he would be out sleeping. Everyone else would be in the house by the stove and he would be out.

His brother struck him in the back of the head with a brick and knocked him unconscious for about two hours. After that he would act real funny. He would act right quiet and when you bothered him, he would jump and jump around.

I have an opinion as to whether or not Willie Norvel is sane or insane. In my opinion he is insane.

[fol. 15] Cross-examination.

By Mr. Leeds:

I have an opinion as to whether Willie was able to distinguish between right or wrong as of August 17, 1941. He didn't know right from wrong. I don't understand the question.

Redirect examination.

By Mr. Holman:

I understand what he means by an opinion. I have an opinion as to whether Willie Norvell is sane or insane. On August 17th he was insane. I have an opinion now as to whether he could tell the difference between right and wrong on August 17, 1941. My opinion is that he could not.

Recross-examination.

By Mr. Leeds:

I last saw Willie Norvell at church on August 17th. I was at church and they came to church. I saw him after the first Sunday in August. I saw him at night on Sunday, August 17th. I saw him over to his grandmother's that night. I don't know what time it was. It was dark outside.

HATTIE WILLIAMS, a witness called by defendants James and Willie Norvell, testified as follows:

Direct examination.

By Mr. Holman:

My name is Hattie Williams. I live at 1958 Hubbard Street, Chicago. I am 73 years old.

[fol. 16] I am the grandmother of James and Willie Norvel. I raised them. I have had them ever since one of them was one day old.

Willie Norvell had some diseases during his childhood. He had fits when he was two years old. He had the rickets.

He had a peculiar way. He would go out in the alley and if he found a dead puppy he would bring it home and wrap it up. I would find that dog in my house. None of the other children did that. If he would come across some puppies that somebody put out, he would take them and bring them all into the house and hide them. None of the other children did anything like that.

That tooth he has out in front, he had a spasm and fell off the gate and he knocked a hole back here in his head. He was 8 years old when he fell off the gate. After that he acted crazy.

He would act very crazy and wouldn't ever have much to do with the other children. He would be different with the children and I would have to stay home.

He would be quick to get mad, and when he had those spells he would get stiff and straighten out. You would have to rub him and he would claim he was afraid and [fol. 17] wouldn't say anything two or three days. He was very drowsy. None of the other children acted like that.

He would take sugar. I had to quit buying sugar. I would buy 5 cents worth of sugar every morning to keep him from pouring it in the milk bottles.

When he was about 8 years old, he would slip down the alleys by days and get into ash cans to keep his feet warm. He would hide himself that way all day and people would come along and tell us about this boy being in the alley. I would have to go after him and make him come home. He would get out at night. We missed him. Then we would have to go along and look through the alleys and go to everybody's house to find that boy. During these times it was cold outside. Everyone else would be at home, at the fire.

I have seen him out in the streets in the winter time with a swim suit on. He would go out without his clothes on if we didn't watch him after those spells. He was 13 or 14 when he was doing this. He had done this all along. None of the other children did that.

He didn't go anywhere in school, the second or third grade. They couldn't teach him anything. They turned [fol. 18] him away from school and put him over to the Montefiore. They said they thought he could make something out of wood to keep his mind working. Then he wouldn't go. Then they put him over here to the homes on Roosevelt, the juveniles'. He stayed there in that school a while. I saw a paper on which a doctor said this is a feeble minded boy.

Willie's brother hit him in the head with a brick. He fell down, unconscious. He stayed sick, drooping around

for one week. After that he didn't act good. He always had those spells.

I have an opinion as to whether Willie is sane or insane. In my opinion he is insane. I have an opinion as to whether or not he was sane or insane on August 17, 1941. Willie could not tell the difference between right and wrong on August 17th, 1941.

Cross-examination.

By Mr. Leeds:

I don't know what the word "opinion" means.

Dr. WILLIAM H. HAINES, a witness called on behalf of defendants Edgar Shepard and James Norvell, testified as follows:

Direct examination.

By Mr. Aschen:

Defendant Edgar Shepard is a mentally defective individual, but he knows the nature of the charge against him and he is able to cooperate with counsel. A mental [fol. 19] defective is one who doesn't acquire the full ability to learn.

If I examined Shepard in a certified free dispensary, I would recommend his commitment to an institution.

Direct examination.

By Mr. Holman:

Mr. Holman: The doctor is called on behalf of defendant James Norvell.

I classify James Norvell as a mental defective of the moron type. In my opinion he could be improved, but he could not be brought up to normal.

The defendants rest.

State's Rebuttal Evidence

Dr. William H. Haines, a witness called on behalf of the State, testified as follows:

Direct examination.

By Mr. Leeds:

I am the same Dr. Haines who testified previously. I conducted a psychiatric examination of Willie Norvell.

I examined him first on October 16, and I completed my examination on October 22. The physical examination showed a well developed male who had a recent gun shot wound beneath the right knee. Examination of the heart, lungs and nervous system revealed no pathology.

[fol. 20] I also examined the social history of this defendant. My findings in that connection were that he was born in Missouri, after which the family moved to Chicago. As a child he suffered from rickets. At age 3 the mother deserted the family and he was cared for by an elderly housekeeper whom the father brought into the home. He received little supervision in the home.

At age 13 he was transferred to a correctional school because of irregular attendance. Psychological tests revealed an I.Q. of 70. The school reports that he had difficulty in concentrating. His attention was unsteady and he was easily distracted.

He had a speech difficulty and both his auditory and visual memory were poor. He was placed in an ungraded special division class. He left school at age 16, and worked on and off as a laborer. In 1940 he went to Arkansas and worked in the fields. He returned to Chicago in 1941. He had an occasional odd job since. A few months ago he married a 15 year old Negro girl, who had recently graduated from grammar school. She was pregnant at the time of the marriage.

The patient is described as having a quick temper, gets angry easily and hits when he gets mad. He is nervous [fol. 21] and restless, tense and jerks in his sleep. Has a hot temper.

I made a psychiatric examination. It revealed an 18 year old Negro male, married, neatly dressed, cooperative. Very alert. There is no press of speech or overt behavior.

He states his mother was killed in an accident in 1933, when the patient was 8 years of age. He states his father separated when he was 2 months old and adds, my father now lives with us.

He quit school in 1939 to take a job, as he had to support his brother and father. The father was in an automobile accident in 1940 and both legs were broken.

The patient states he started to school at the age of 4 and quit the 8-A grade in 1914 (sic). States he had no trouble with his studies, but had difficulty because of his attendance. He is oriented in all spheres. General information is adequate, calculation is poor. Judgment stories satisfactory. Venereal disease is denied. Makes no complaints with reference to the nervous system and questioning elicits none.

The psychological examination revealed 66 on the Bellevue-Wechsler, 63 per cent of the Verbal and 77 per cent [fol. 22] on the Performance. The Army Alpha 72 per cent, the Otis Self Administering was 56 per cent, and the Stanford-Binet was 66 per cent.

That was the full extent of the examination I made of this defendant.

Based upon my examination nad my experience I have an opinion as to whether the defendant, Willie Norvell, is sane or insane. At the time of my examination October 16th to October 22nd, it is my opinion that Willie Norvell is sane.

I have an opinion based upon my examination as to whether or not Willie Norvel is capable of forming a criminal intent. My opinion is that he can. I have an opinion, based upon my examination of Willie Norvell, as to whether he was able to distinguish right from wrong. It is my opinion that he can.

Based upon my examination of Willie Norvell, I have an opinion as to whether he can resist the impulse to commit a criminal act. It is my opinion that he can.

Assuming a well developed colored male about 18 years of age, born in Missouri, whose family moved to Chicago as a child, and this colored male about 18 years of age at

an early age suffered from rickets, and at the age of 3 his mother deserted and he was cared for by an elderly house-[fol. 23] keeper, that he received little supervision in his home, and at the age of 15 was transferred to a correctional school because of irregular attendance in school; that the psychological tests revealed an I.Q. of 70; that the school reports reveal he had difficulty in concentration, his attention was unsteady and easily distracted, his speech was difficult and his auditory and visual memory was poor; that he was placed in a special ungraded division of the class and at the age of 16 he left school; that he worked on and off as a laborer nd in 1940 went to Arkansas and worked in the fields there and returned to Chicago in 1941; that he had occasional odd jobs since; that he married a 15 year old Negro girl who had recently graduated from grammar school; that he had a quick temper gets angry easily and hits when he gets mad; that he is nervous and restless, is tense and jerks in his sleep; that he has a huge appetite and craves sweets. Assuming further that on August 17, 1941, this hypothetical person, in company with two other young men went to a factory at 3120 to 3152 W. Fulton Street, in the rear, and there one of the three men threw a brick through a window and a door was opened and a watchman put his head out. This hypothetical [fol. 24] person struck the watchman on the head with a stick and forced the individual into the plant and proceeded to beat him further, which resulted in the death of this watchman on August 17, 1941. Assuming further that after the watchman was knocked out he was tied up by this person and his companions; that then this person and one of the companions went into the office of this plant and this person broke a combination lock and opened the safe. Upon finding nothing this person and his companions left this plant and thereafter went for an automobile ride. Then went out to the south side to spend the night. Assuming further that on or about September 17th, 1941 the police attempted to arrest this person and he jumped from one window to another on the third floor, ran down the stairs and in through the alleyway and was ordered to halt by a detective; upon refusal to halt was shot and continued to escape; the person then hid and later, on September 21st, was chased and ran away from the police officers who

sought his arrest, and ran through various places and then dove through or jumped through a skylight and hid in the basement of this building and was put under arrest by the police; he was subsequently questioned on September 21st in the police station by an assistant state's attorney, where- [fol. 25] in he gave a complete story as to the occurrence at this plant on August 17th, 1941, and also detailed in that statement the circumstances concerning this attempt to arrest him and the arrest on the date in question.

Mr. Leeds: Q. Assuming all those facts, Doctor, have you an opinion based upon your experience and your education, as to whether or not this hypothetical person was sane or insane on August 17th, 1941?

Mr. Holman: I object, if the Court please.

The Court: What is your objection?

Mr. Holman: The objection is that he has omitted a number of essential factors testified to by the defendant.

The Court: Add to your question.

Mr. Leeds: Testified to by the defendant?

Mr. Holman: By the defendant's witnesses.

Mr. Leeds Yes.

Q. And assume further, Doctor, that relatives of the hypothetical person testified that he was insane; that he suffered from rickets and that he had received a head injury as a youth, and that he had a habit in his youth of sleeping under porches, running away from the house, and [fol. 26] of bringing in dead dogs into the house;

Have you an opinion, Doctor, based upon your experience and education as to whether this hypothetical person was sane or insane on August 17th, 1941?

Mr. Holman: I object. I have the same objection. There are still quite a number of omitted facts, if the Court please.

I make the further objection that the question is improper in its form for the reason he asked the Doctor to consider the fact that the witnesses testified to that. As I understand the law, he has to consider as facts whatever the evidence shows and not the fact the witnesses testified to it.

A further objection, he has omitted from his hypothetical question that the evidence shows that in cold weather the boy slept under a porch; he has omitted the fact he

stayed in ash cans hour after hour and neighbors had to notify his relatives about it. He has omitted the fact that in the cold winter time he was out in a swim suit at the age of eleven years. Also omitted the fact he fell off a gate [fol. 27] when he was five or six years old, and knocked in the head by a brick in his brother's hands and was knocked out for two hours and wasn't able to concentrate. He has changed the fact which the evidence shows, that he dove down into the skylight head first and not that he jumped——

The Court: As to that objection, the doctor may take into consideration this set of facts that you have detailed here. That may be added to the hypothetical question.

Mr. Hollman: And the further fact which you recall, the calling of two particular names to awaken him, Alice and Bertha.

The Court: The doctor may take that into consideration.

Mr. Leeds: Yes.

The Court: As to the other objection you stated to the question, if this is incorporated in the question, I will allow it. Overruled.

Mr. Leeds: Q. Have you an opinion, Doctor?

A. Yes. As to the calling of the names, that is Alice and the other name, to awaken him, how often did that take place?

Mr. Holman: All his life.

[fol. 28] Mr. Leeds: There was no such testimony. On occasions they used them.

Mr. Holman: On occasions they used them, but it was all during his life that these occasions arose.

Mr. Leeds: But they weren't constant.

Mr. Holman: No.

Mr. Leeds: They were from time to time that these were used.

Mr. Holman: Over his whole life period.

The Court: The evidence further shows that one of the girls he went around with, her name was Alice.

Mr. Leeds: And one was Dorothy.

Mr. Holman: No.

The Court: One was Alice. And then the witness testified about that,—about this matter of jumping out of bed

on the calling of either of those names, which had taken place to her knowledge during those years she knew him.

Mr. Leeds: That is correct.

The Court: All right.

The Witness: Can you give me an example of that?

Mr. Holman: No.

Mr. Leeds: Of what?

Mr. Holman: I submit we can't elaborate on it.

The Court: Q. Now, taking all the facts into consideration as have been detailed here, can you give the Court an opinion as to whether he is sane or insane? First state whether you have an opinion.

A. I have an opinion.

[fol. 29] Mr. Leeds: Q. What is that opinion?

A. That he was sane.

Mr. Holman: I move the answer be stricken, because he doesn't give the reasons for his opinion. That is always necessary.

The Court: Well, you have a right to ask him that.

Mr. Leeds: Yes.

The Court: Either side has a right to ask him to state the reasons. It is not compulsory.

Mr. Holman: As I understand it, it is compulsory.

Cross-examination.

By Mr. Holman:

It would not change my opinion if it had been necessary all his life from the time he was 6 years old until today to call these names in order to awaken him. When I asked for the example of this activity it was not for the purpose of forming my opinion. I had an opinion before that. I understand I am testifying about a hypothetical person and not about any one individual. The fact that this hypothetical person had been knocked in the head and knocked unconscious for 2 hours would not change my opinion. I took into consideration in giving my opinion the fact that he was knocked unconscious and stayed unconscious for 2 hours and that afterward he acted crazy and stared into space. I would still say he was sane.

I would still say he was sane after considering that he had rickets in childhood. My opinion is not changed by considering the fact that he had fallen off a pole when he was 5 years old and knocked conscious. My opinion is not [fol. 30] changed by the fact that he was up on a two story building and dove through the skylight. He was still sane.

The State rests.

The defense rests.

The Court: I know there will be some questions raised about the proper admittance of those confessions where there is no basis laid under the law or evidence of warning under the statute and making known that they have certain constitutional rights. Assuming that is stricken, where are you in your evidence in this case? You are in a position, of course, to have witnesses testify verbally, you know that.

Mr. Leeds: Yes. We have had verbal conversations.

The Court: Well, you have verbal conversations, but have you in the record any conversation about the actual crime?

Mr. Leeds: No. I don't think it was necessary. I am prepared to argue as to the warning right now and rely on the Fox case.

The Court: Well, I want to state the situation for the record, that if the confessions as to two of these boys are stricken, there is no testimony whatsoever against them [fol. 31] outside of the verbal statements, if they are in the record, that incriminate these boys.

Mr. Leeds: I will say this, there is the verbal statement of the defendant, Willie Norvell, that is definitely in the record, and I think there are other statements, but I am not certain. The one that stands out in my mind is the one of Willie Norvell, where he stated to the police officer he killed that man, killed that watchman. Officer Nygren testified to that.

The Court: You have the exhibits. We will want them in the argument. Bring them in Monday morning at 11:30 A.M.

November 3, 1941.

(Note: This is Healy, following Allen at 2:30 P.M.)

Defendant's motion to suppress confessions denied:

Statement of Willie Norvell taken in the captain's office, Warren Avenue Police Station, 2743 Warren Avenue, Chicago, on Sunday, September 21, 1941, at 2:30 o'clock P.M.

Present: David Leeds, Assistant State's Attorney; Captain Walter McGloon; Lieutenant LeRoy Steffen; Officer Walter Rusin; Anton Remenih. Reported by F. A. Sheeder:

[fol. 32] MR. LEEDS: What is your name?

A. Willie Norvell.

Q. Where do you live?

A. 1958 Hubbard Court.

Q. How old are you?

A. Eighteen.

Q. Are you married or single?

A. Married.

Q. How far did you go in school?

A. Eighth grade.

Q. Did you graduate?

A. No Sir.

Q. And what is the school you attended that you reached the eighth grade in?

A. Emerson.

Q. Can you read and write the English language?

A. Yes sir.

Q. Do you understand the questions that I am asking you so far?

A. Yes sir.

Q. If you do not understand me, will you say so?

A. Yes.

Q. What have you been doing for a living?

A. Well, first, I was cutting timber down in Arkansas, and my father got his leg hurt; I was down there when it happened——

[fol. 33] Q. And when was that?

A. That was in '40.

Q. 1940?

A. Yes.

Q. And how long did you stay in Arkansas?

A. Seven months.

Q. Then you came back to Chicago?

A. Yes sir.

Q. Have you been working here in Chicago?

A. Yes, I worked in a foundry motor equipment company at 4600 West Harrison.

Q. When did you work there?

A. I worked there about—let's see, it was in '40, I worked there about a year and four months.

Q. How long have you been out of work?

A. Well, I go to the market every day and get a job on the market loading and unloading trucks down there, on the corner of Randolph Street there is a big building there.

Q. But you have had no steady employment since you returned from Arkansas, have you?

A. No sir, just on and off.

Q. Are you married or single?

A. Married.

[fol. 34] Q. What is you wife's name?

A. Amie, Amie Norvell.

Q. Do you live with her at that same address you gave us?

A. Yes sir—no, I lived there sometimes and sometimes I lived on the South side at the Brookmont Hotel.

Q. You understand that my name is David Leeds, I am an assistant state's attorney, don't you?

A. Yes.

Q. This gentleman right here I am pointing to is a court reporter. You understand that?

A. Yes.

Q. He is taking down what I am asking you, in shorthand, and your answers, and he will later transcribe into writing——.

A. Yes sir.

Q. You understand all that?

A. Yes.

Q. Now, since you have been arrested, nobody has threatened, beaten you or intimidated you in any way, have they?

A. No sir.

Q. Now, you gave a statement to the police, did you not, [fol. 35] at 11:40 A.M. today regarding this occurrence

wherein one Michael Hetman, a watchman was killed at 2130 to 52 West Fulton Street, did you not?

A. Yes sir.

Q. Now, the statement you gave the police at that time was the truth, wasn't it?

A. Yes sir.

Q. You also understand that I am going to ask you a lot of questions concerning that occurrence, don't you?

A. Yes.

Q. Understanding that, you are willing to give me a statement of your own free will concerning that?

A. Yes sir.

Q. Now, nobody has held out any hope or promise of reward for making a such statement, have they?

A. No sir.

Q. And you understand that the statement I am going to take from you at this time will be used against you at a future criminal proceeding, do you understand that?

A. Yes.

[fol. 36] Q. And with that understanding you will tell me about it, will you?

A. Yes.

Q. Do you know what time you were arrested?

A. I think about eleven—let's see. I don't know exactly what time it was, but somewhere about eleven, I think. The officer knows.

Q. About eleven o'clock this morning?

A. Yes.

Q. Do you know where you were at that time?

A. On the corner of Ashland & Lake.

Q. Now, since you have been in custody the police have taken you to the Bridewell Hospital for treatment for your wounded leg, haven't they?

A. Yes sir.

Q. You were also treated for a head injury, were you not, at the Bridewell Hospital?

A. Yes sir.

Q. And you got that somewhere during your attempt to make an escape from the police today, didn't you?

A. Yes sir.

Q. Now, do you know what sort of place is located at 2130 to 52 West Fulton street?

A. Yes sir.

[fol. 37] Q. What is located there?

A. Well, there is a furniture factory where they make duofolds and tables, make the forms of it.

Q. Do you know James Norvell?

A. He is my brother.

Q. You understand he is arrested and in custody in connection with this crime?

A. Yes sir.

Q. Do you know Edgar Shepard?

A. Yes sir.

Q. How long have you known Edgar Shepard?

A. About three years.

Q. He has been a very good friend of yours, hasn't he?

A. No, he never—he never run with us. My brother has been going with his sister about six years, that is my oldest brother.

Q. Your oldest brother's name is Jesse?

A. Jesse.

Q. Well, Edgar has been very close to you for the last three months, hasn't he?

A. Not for that time, but he and my brother went together.

[fol. 38] Q. Well, he has been going out with you sometimes, hasn't he?

A. Sometimes he do.

Q. When did you plan to go over to 2130-52 West Fulton Street to break in that factory?

A. Well, Edgar Shepard, he went around and looked at the joint—looked at the place, and I just come from the Brookmont Hotel that morning. It was on Saturday morning——

Q. How long ago was that?

A. It was about a month ago, I think.

Q. Well, this occurrence took place on August 17th, 1941, that was a Sunday?

A. Yes sir.

Q. Now, just before that Sunday when did you plan to go over and break into the place, how long before that day?

A. About a week.

Q. Who looked the place over?

A. Edgar Shepard.

Q. Now, did you know about the place a week before:

A. No sir, but Edgar come back all the time—I didn't know nothing about it.

[fol. 39] Q. Well, when was the first time you knew anything about going in to break into that place?

A. Eddie Shepard come up to my house and got me and my brother about a week before.

Q. What did he say regarding the place?

A. Well, he said he knew a place where we could get in at.

Q. Did you go over and look at the place that day?

A. No sir, I went that Sunday.

Q. The following Sunday?

A. Yes sir.

Q. Now, what time did you see Edgar Shepard on the 17th?

A. I think about four o'clock.

Q. In the afternoon?

A. Yes.

Q. Was your brother James Norvell with you?

A. Yes sir.

Q. Did you immediately go over to 2130-52 Fulton Street?

A. Yes sir.

Q. How did you go over to the place?

A. Went through the alley.

[fol. 40] Q. Did you walk from your house or from where?

A. Walked from my house.

Q. And in what direction did you go, down the alley east or west?

A. West.

Q. When you got to the rear of 2130 did you have a conversation either in the rear of the place or before you got to the place as to what you were going to do when you got there?

A. When we got in the alley, he said he would go on and look in to see if there was anybody in there.

Q. Who said that?

A. Eddie Shepard. He went around and looked in the front window and then he came back and me and my brother was waiting in the alley, then he come back and said nobody was in there.

Q. Then what did you do?

A. After he come back he took a piece of iron and knocked the window out.

Q. Who did, you or Edgar?

A. Edgar, he threw it.

Q. Now, after Edgar threw that piece of iron through the window and broke the window, then what happened? [fol. 41] A. The night watchman came to the door.

Q. And did he open the door?

A. Opened the door.

Q. Did he come all the way out in the alley when he opened the door?

A. A little ways.

Q. And what happened when he came out a little ways?

A. Me and my brother grabbed him.

Q. When you grabbed him, what happened?

A. We started fighting and hitting him.

Q. What were you hitting him with?

A. Well, my brother had a piece of iron and me and Eddie Shepard had a stick.

Q. You were hitting him with these things that you had, were you?

A. Yes sir.

Q. And then what happened?

A. And then after we hit him with the stick, he started to tussle around.

Q. And did you three keep hitting him?

A. I stopped and I said, don't hit him no more, but they kept it up, my brother and Shepard, and then I started hitting him too on the legs.

Q. Then what happened after you kept on hitting him? [fol. 42] A. I told Eddie Shepard to go and get a rope.

Q. Then what happened?

A. Then we tied him up.

Q. Who tied him up?

A. My brother tied him up.

Q. And what did you tie him up to?

A. A post.

Q. Was that an iron post there?

A. Yes.

Q. Sort of a big pipe?

A. Yes.

Q. And is there a wooden cabinet right next to where that iron post is at?

A. Yes.

Q. Who tied a towel around his neck?

A. Eddie Shepard did, he tied it around because his head was bleeding.

Q. Where did he get the towel?

A. I don't know.

Q. Now, after you had the watchman tied up against this post, was he conscious or unconscious?

A. Well, he was conscious, he was breathing, breathing kind of hard.

[fol. 43] Q. Was the watchman knocked out after you got through tying him up to the post?

A. No sir, he wasn't knocked out.

Q. After you finished tying the watchman up to this post then what did the three of you do?

A. We went on through—went on back to the front.

Q. Is that the office part?

A. Yes, the office.

Q. Who went back to the office?

A. I did.

Q. Who else went with you?

A. Eddie Shepard.

Q. And where did your brother James go?

A. He was looking around.

Q. Was he supposed to act as lookout for you?

A. No sir.

Q. When you got in the office, did you find a safe there?

A. Yes sir.

Q. After you found the safe what did you do?

A. Went and got some tools.

Q. Who did?

A. Me.

Q. What kind of tools did you get?

[fol. 44] A. A chisel, a rubber handle——

Q. What else besides a hammer and chisel?

A. A small crowbar, a crowbar about that big (indicating).

Q. Indicating a crowbar of about three feet. Then what did you do after you got these tools?

A. Well, we started beating on the safe.

Q. Who did?
A. I did.
Q. And what did you do after you started to beat on the safe?
A. Then I kept on working at the safe.
Q. Did you break the combination lock off?
A. Yes sir.
Q. At the time you were doing this, where was Edgar Shepard.
A. Well, he was at the door looking out.
Q. And where was James at this time?
A. He was helping me, we all took turns on it.
Q. Did you finally open the safe?
A. Yes sir.
Q. Did you get anything out of the safe?
A. No sir, we didn't get no money at all.
Q. Well, what did you do after you found there was no money in the safe?
[fol. 45] Well, we started back to the back to go out.
Q. And on the way out did anybody do anything?
A. Eddie Shepard put a blanket over him.
Q. Over who?
A. Over the man, the night watchman.
Q. Was he still breathing at that time?
A. Yes.
Q. What about a fire extinguisher?
A. Well, he said he liked to play with them or take and leave the water out of them.
Q. What did he do with the fire extinguisher?
A. He started shooting it up to the ceiling and then down on the floor and shoot it all around.
Q. Did he do anything with the night watchman?
A. Yes, he squirted some water on him.
Q. Then after Edgar Shepard finished playing with this fire extinguisher, what did the three of you do?
A. Went on out.
Q. Where did you go?
A. I went on home.
Q. Who went with you?
A. All three of us went.
Q. And after you got home what did you do?
[fol. 46] A. I put on my clothes.

Q. Then what did you do?

A. Went on the South Side.

Q. Before you went on the south side, did you go any place with the boys?

A. Yes.

Q. Where did you go with the boys?

A. Went on straight down Western to some cars down there, in Jesse's car, a car lot on that side of the street.

Q. On the east side of the street?

A. Yes.

Q. Who went riding in Jesse's car?

A. Me, Eddie Shepard, my brother James and my wife and his wife.

Q. Whose wife?

A. My brother Jesse's wife.

Q. And where did you go to on Western Avenue?

A. To the car lot.

Q. What did you do when you got to this car lot?

A. Got in a little car and started riding around.

Q. Now, when you got home after you finished at this furniture place was it still light outside?

A. No sir, it was just getting dark.

[fol. 47] Q. And when you got on the South Side, it was getting dark, too?

A. Yes sir.

Q. By the South Side I mean on Western Avenue.

A. Yes.

Q. After you finished riding around on these little racers where did you go?

A. We rode around a little while, and my brother was out of gas with the car and then he say he got to hurry up and get home.

Q. Did you drive back then to your neighborhood?

A. Yes sir.

Q. Did you go to your house or did you go to Edgar Shepard's house?

A. I went to my house and from there I went on South.

Q. What happened to Edgar Shepard?

A. I don't know, him and my brother stayed home.

Q. Where did you go when you went to the South Side?

A. I went to the Brookmont Hotel.

Q. Who went with you?

A. My wife.

Q. When did you find out this man who was the watchman at this furniture place was dead?

[fol. 48] A. I seen it in the paper.

Q. What day?

A. Let's see——

Q. This happened on Sunday, didn't it?

A. Well, I think I seen it on a Tuesday, if I ain't mistaken.

Q. Where were you at the time you saw this in the paper, where, on the South Side or West Side?

A. I was on the South Side in the bed.

Q. And did you then come back to the West Side?

A. The next day I did.

Q. Where did you stay at?

A. Then I went to see my grandmother and stayed there.

Q. Did you talk to your brother James Norvell and Edgar Shepard about this after you found out the watchman was dead?

A. Yes.

Q. When did you first learn that the police were looking for you?

A. After I got through killing the man—I didn't know the police was looking for me then.

Q. Well, the police tried to arrest you, did they not, on September 17th?

[fol. 49] A. Yes sir.

Q. That was last Wednesday?

A. Yes.

Q. Where were you when they tried to arrest you, at what place?

A. In my grandmother's house.

Q. Where is that located?

A. 1958 Hubbard.

Q. Where does she live, on the first, second or third floor?

A. Third floor.

Q. When the police tried to arrest you, what did you do?

A. Jumped out the window.

Q. Did you jump from that window to the floor or to another window?

A. Another window.

Q. And then what did you do?

A. Then I went through a lady's house and down the back stairs.

Q. When you got downstairs, where did you go?

A. I went through a little gangway, a little gangway and I went that way in another little areaway about that wide.

Q. Then where did you go?

[fol. 50] Then I went on across Damen and when I run across Damen the police come and they shot at me, I think two times, and the other shot caught me in my leg.

Q. Which leg were you hit in?

A. The right leg.

Q. They didn't arrest you at that time though, did they?

A. No sir.

Q. Now, after you were shot, did you keep on running?

A. Yes sir,

Q. Where did you go?

A. I jumped over a fence and a fence.

Q. Well, where did you finally land up?

A. I landed by the junk shop.

Q. Where is that junk shop at?

A. On Hubbard.

Q. Did you hide there?

A. For a little while, about an hour.

Q. There where did you go?

A. Then I went over to my mother's house, but she didn't know I was there.

Q. Where is your mother's house at?

A. On Fulton.

[fol. 51] Q. What is the address on Fulton?

A. I don't know 233 k I think it was.

Q. By your mother's house, you mean your wife's mother's house?

A. Wife's mother's house.

Q. Did you stay there all night?

A. No sir, she didn't know I was there, I didn't have no clothes on.

Q. Well, when you ran away from the place to avoid arrest you ran away naked?

A. Yes.

Q. And you ran down the street naked, is that right?

A. Yes sir.

Q. Well, all right. Now, you were at your grandmother's house, is that right?

A. Yes.

Q. And how long did you stay there?

A. Well, I didn't stay no time, I went in the basement—the basement door was open and I went down there seeing if I could find some clothes to put on and I found a pair of pants and jacket and put them on.

Q. Then where did you go?

A. Then I went in a car on Walnut and slept.

[fol. 52] (Q). Did you sleep all night in this car?

A. Yes sir.

Q. You knew the police were out looking for you though, didn't you?

A. Yes.

Q. All right, where did you go the next morning, which was Thursday morning, where did you go?

A. I went to a lady's house.

Q. What is her name?

A. I don't know her name.

Q. Where is her place at?

A. On Fulton.

Q. How long did you stay at this woman's place?

A. About three days.

Q. That is from Thursday until Saturday?

A. Yes sir.

Q. Where did you go—did you go out of the house at all during those three days?

A. No sir.

Q. Where did you go to after you left her place on Saturday?

A. Then I went over to my cousin's house.

Q. Where is your cousin's house?

A. I think on Blue Island.

Q. What is your cousin's name?

[fol. 53] A. Boydahl.

Q. And did you stay there Saturday?

A. Yes sir.

Q. Did you sleep there Saturday night?

A. Yes sir.

Q. Then where did you go to Sunday morning, that is this morning?

A. Oh, let me see, then I went and stayed in a hotel on 29th street.

Q. What is the name of the hotel?

A. I don't know the name of the hotel.

Q. When did you stay there?

A. Last night.

Q. And you didn't sleep at you cousin's house on Blue Island then?

A. No sir.

Q. When you got up this morning, where did you go?

A. Then I come over here.

Q. Where did you go to over here?

A. In the park.

Q. What park?

A. Union park?

Q. How long did you stay in Union Park?

A. That is when No. 7 rolled up.

[fol. 54] Q. Just before squad No. 7 came up?

A. Yes.

Q. When you saw them coming, what did you do?

A. Started running.

Q. Did they chase you?

A. Yes sir.

Q. Where did you run to?

A. I went around through the alley and come back to the park.

Q. When you got back to the park, what happened?

A. Then I walked across and then I seen Red, you know, a police squad, and they looked at me and they kept going, the Union Park Police, he kept going.

Q. Then what happened?

A. Then I run through the lot and one guy that was in No. 7, he seen me and then I turned around and started running back.

Q. Then what happened?

A. Then I went up some stairs on Lake and Ashford and knocked out a window and went in the house.

Q. Did you know anybody in that place that you knocked out a window and got into?

A. No sir.

[fol. 55] All right, when you got in that apartment what happened?

A. Then I went out the back door.

Q. Into the alley?

A. No sir, up on the roof.

Q. And what happened while you were on the roof?

A. Then I stayed up there and I knocked a window out in a hay factory.

Q. Then what did you do?

A. Went down there.

Q. And how long did you stay there?

A. About fifteen minutes.

Q. Then what did you do?

A. Then I went to the back door and the Police seen me and he said come out.

Q. And they caught you right in this hay place?

A. Yes.

Q. Now, while you were running around and jumping through the various places that you have just told us about, is that where you got that head injury?

A. Yes.

Q. The time that you were arrested was about eleven o'clock, is that right?

A. Yes sir.

[fol. 56] Q. Now, in addition to being called Willie, do you have a nickname that you go by?

A. They call me Babe.

Q. Has Edgar Shepard got a nickname?

A. Yes, Gumpy.

Q. Is he also called Junior?

A. Yes sir.

Q. And your brother Jimmy has no nickname, has he?

A. He hasn't got no nickname.

Q. Is there anything else you want to tell us about this occurrence that you have not told us?

A. I told you everything.

Q. Now, after this statement is written up and you have a chance to read it, and you find it contains everything that has gone on between us here and the questions I have asked and the answers you have given, will you sign it?

A. Yes sir.

Q. Why?

A. Because it is the statement made and it is the truth.

[fol. 57] MR. LEEDS: That is all.

(Signed) Willie Norvell.

Witness: —.

Closing arguments.

JUDGMENT AND SENTENCE

The Court: All 3 defendants are found guilty of murder.

Defendant Willie Norvell sentenced to the penitentiary for 199 years; defendants James Norvell and Edgar Shepard sentenced to 50 years in the penitentiary.

Oral motion for new trial overruled.

Oral motion in arrest of judgment overruled.

I, Gerald J. Healy, do hereby certify that on the 27th day of October, 1941, I was one of the Official Shorthand Reporters of the Criminal Court of Cook County, Illinois, and that as such Official Shorthand Reporter, I reported in shorthand the testimony taken and proceedings had on the dates shown of record in the 144 pages of transcript contained herein, in the case of the People of the State of Illinois vs. Willie Norvell, *et al.* / Indictment No. 41-1473, before the Honorable Edgar A. Jones, one of the judges of [fol. 58] the Criminal Court of Cook County, and do hereby certify that the above and foregoing transcript is a true and correct report of the testimony taken and proceedings had in the above entitled cause on the dates as shown of record.

(s) Gerald J. Healy, Official Shorthand Reporter Criminal Court of Cook County.

Certificate to report of proceedings of Hon. Richard B. Austin, March 24, 1961.

Petitioner's Exhibit 1, court reporter notebook of E. M. Allen, Book No. 815, containing shorthand notes taken from October 24 to 29, 1941. Admitted in evidence June 29, 1961; certified and ordered filed December 8, 1961, by Hon. Joseph J. Drucker.

Report of proceedings held before Hon. Richard B. Austin.

[fol. 59] HEARINGS BEFORE JUDGE AUSTIN—June 29, 1961

EVIDENCE ON BEHALF OF DEFENDANT WILLIE NORVELL

NED HOSFORD testified as follows:

Direct examination.

By Mr. Pfaff:

My name is Ned Hosford. For the past 14 years, I have been an official Court Reporter of the Criminal Court of Cook County.

I am appearing here today pursuant to a subpoena duces tecum that required me to produce a set of shorthand note books. I have the shorthand notes that E. M. Allen took in this Willie Norvell case on October 29, 1941 before Judge Jonas. I do not have any other notes for any other dates that Mr. Allen was in attendance on this case.

I have Miss Margaret Meek's shorthand notes for the morning of November 3, 1941. I can't locate any notes in this Norvell case that morning.

Petitioner's Exhibit No. 1 for identification is the book which I obtained yesterday from the basement vault of the Criminal Court Building enclosed in a large package of notebooks with the name E. M. Allen and certain dates upon the outside or wrapper of this package. It purports to be the notes that were taken by Mr. Allen on the dates indicated. The dates included in the notebook are October [fol. 60] 24, 1941 and October 29, 1941.

There are notes in the book for October 29 that pertain to the Willie Norvell case. The notes do not being on a numbered page. The name of the case and the lawyers present, together with the names of the defendants, are in long hand at the beginning of the case. The Judge is indicated on the front cover of the notebook as being Judge Jonas, October 29.

There is a notation on the front of the book that indicates that the estimated testimony covered 250 pages with statements, or 200 pages without statements. From my experience as a court reporter, I know that 250 or 200 indicates number of pages and not dollars or anything

else. This is the number of transcribed pages, not shorthand notes.

I cannot read the shorthand notes that Mr. Allen took in this case. These notes are basically a Munson system of shorthand. I knew Mr. Allen during his lifetime and often we would compare notes I recall very vividly one day looking at his notes and asking him what sort of shorthand he wrote. He laughed and said it was the "Allen system." He had incorporated in this original Munson system a great many arbitrary symbols of his own that [fol. 61] meant something to him, but mean nothing to me.

On one occasion, I was present when a Munson shorthand writer, a very excellent reporter, looked over Mr. Allen's notes in another case, not in this case, and said that the notes were well written, that he could not read some of it. Some of it was unintelligible to him, and it would require a great deal of study on his part to familiarize himself with Mr. Allen's notes before he could ever make a transcript. For that reason he declined to undertake the job of preparing a transcript from Mr. Allen's notes.

To my knowledge they have not taught Munson shorthand system in any school for 20 or 25 years. There are probably still some people in the court reporting business that may use Munson shorthand, but I don't know of any.

In my experience, I have run across perhaps 3 or 4 people engaged in the court reporting business that write Munson shorthand. Mr. Allen was one of them. There were some others that are now deceased.

The Court: The Court having had some contact with the Bragg case, and having been a witness in the Bragg case, in an effort to reconstruct a bystander's Bill of Exceptions, would like to say for the record that I am convinced [fol. 62] as a result of my investigation and connection with the Bragg case that there probably is no one in the country who can transcribe Mr. Allen's notes.

(Petitioner's Exhibit No. 1 admitted into evidence.)

Cross-examination.

By Mr. Robbins:

I did not make any effort to read these notes: I looked them over and I made no effort because it isn't the system of shorthand I write. It is as foreign to me as it would be to you, Mr. Robbins, and it means nothing to me. It is as meaningless as Sanskrit. With my experience, by looking I can tell whether or not I would be able to decipher any particular word.

Re-direct examination.

By Mr. Sullivan:

I brought with me the diary book of the official court reporters for the period in question. On October 27, 1941, the diary indicates the reporter before Judge Jonas was Miss Gene Charters. She now resides in St. Petersburg, Florida.

CLAUDE W. B. HOLMAN testified as follows:

Direct examination.

By Mr. Pfaff:

My name is Claude W. B. Holman. I am an attorney at law. I represented Willie Norvell and James Norvell in the trial of this matter in 1941.

[fol. 63] I do not remember the names of any of the witnesses who appeared on behalf of the State. I do not know how many witnesses there were. I do not remember the names of any witnesses for the defense. I am not even sure whether the defendant testified or not. I do not recall whether or not there were any exhibits introduced. I probably interposed objections on behalf of Willie Norvell during the trial, but what they were or the rulings thereon, I couldn't tell you. I don't remember any objections made by the State, but I can't imagine the State letting me put my case in without objection.

I do not remember the testimony of any witness at the trial, or any portion of it. I do not have in my office any notes, documents or files which would refresh my recollection in this matter.

I do not recall whether or not I made any motions during the trial. I have no independent recollection of the State making any motions in the trial. I have an independent recollection that at the end of the trial I felt real hurt personally when the other defendants got a considerable lesser sentence than my defendant. I remember very distinctly that I felt Judge Jonas had hurt me personally by making that great disparity between the sentences. I don't remem- [fol. 64] ber what the evidence was. It may well be that in light of the testimony, Willie Norvell deserved a more severe sentence. Other than what I have just testified to, I have no other recollection of anything that occurred. I don't remember Willie Norvell executing a jury waiver. I don't remember anything at all.

Cross-examination.

By Mr. Robbins:

At the time of the trial I was privately appointed counsel by this young man or his mother or grandmother. I can describe her. She was a little, small, thin woman.

I have no recollection whether or not any effort was made by Willie Norvell from the day he was sentenced to this date with reference to obtaining a transcript of his trial for an appeal.

I was active in the Criminal Court in 1941, 2 or 3 days a week or maybe more often. I remember a court reporter named Mr. Allen some years back. The name Gerald Healy rings a bell. I do not recall Margaret Meek by name. I remember the name Miss Charters. I remember seeing those people when I went to trial.

I have no independent recollection whether there were motions for a new trial made in the regular course after [fol. 65] the trial. All of the constitutional guarantees which were afforded my client, Willie Norvell, were asserted at that time. I have no independent recollection of this case, but I give the defendant every constitutional guarantee that the law affords.

I have no recollection now on whether or not I was ever called upon for an appeal in this matter. I have no recollection one way or the other whether I was called upon to obtain a transcript of the trial.

EDGAR SHEPARD, testified as follows:

Direct examination.

By Mr. Sullivan:

My name is Edgar Shepard and I am presently in custody in the Illinois State Penitentiary at Joliet. I was a defendant in the case of the People vs. Willie Norvell, James Norvell and Edgar Shepard, No. 41-1473, which was tried in this Court in October and November, 1941. I am not now in custody on the sentence I received in that case. I am in custody on a new crime.

It is my recollection I was represented by Herman Aschen. I was present during the course of the trial in October and November, 1941. The Judge was Edgar A. Jonas.
[fol. 66] I have never talked to Mr. Sullivan or Mr. Pfaff before today.

During the trial, the officers, my mother and my sister were present in the courtroom. Also present were Willie Norvell's grandmother and brother. His wife, Annie Norvell, was there too. Willie Norvell's brother that was present is Jesse Norvell. Willie's grandmother's name is Hattie Williams. My mother is now dead. My sister is still alive. She is Ruby Lee Norvell. She maried Willie's brother Jessie.

James Norvell was present during the trial. Those people are the only people I can recall were present at the trial, except the State's Attorney. I do not remember who the State's Attorney was. I don't remember the name of Willie Norvell's lawyer. I remember there was no jury.

I can't remember the names of any persons who testified on behalf of the State or what their testimony was. I think there was a policeman who testified, but I don't recall his name. I don't recall what his testimony was.

I did not testify, nor did Willie Norvell nor James Norvell. There was no witness who testified on my behalf. I can't think of any witness who testified on behalf of Willie [fol. 67] Norvell. I do not recall whether or not any exhibits were introduced by the defense or whether or not there were any objections made by the State's Attorney during the course of trial. I do not recall whether or not any objections were made by the defense attorney in the course of the trial. I do not recall whether any oral motions were made by the State's Attorney or by the defense attorney. I do not have any knowledge or recollection of anything that occurred in this cause. I was young then and I wasn't paying any attention.

Cross-examination.

By Mr. Robbins:

The Public Defender represented me. I don't know his name.

Willie Norvell, Jr., testified as follows:

Direct examination.

By Mr. Pfaff:

My name is Willie Norvell, Jr. I was a defendant in this case in 1941. I was present at the time of trial. I don't remember the name of the attorney who represented me. I never did know his name. My grandmother got him.

My grandmother, my wife, my brother, my sister-in-law, an aunt, my brother and I were present in the court room at the time of trial. My aunt's name is Quinillo Thomas. [fol. 68] She is living. I think her address is 1429 South Keeler. The name of the Judge was Edgar A. Jonas.

My grandmother died in 1955. My wife is living. Her address is 1457 South Kenneth. My brother Jesse is living. I don't know his address. I had one letter from him in 19 years I have been locked up. He is still in Chicago. I don't know whether Jesse was there all during the trial. The only witnesses for the State was the arresting officers. I don't remember their names. I have copies of the arrest slips.

Their names are on there. The names are Nygren, Madden, Vachlon. I am not sure if 2 or 3 of them testified. I am not sure how many testified. I don't recall what their testimony was. I don't recall that the State had any other witnesses testifying. My grandmother and my aunt testified in my behalf. I don't remember what my grandmother testified to, nor do I remember what my aunt testified to. I don't recall what any other witnesses testified to. I don't recall whether my attorney made any objections during the trial. At that time I didn't know anything about the law.

I can't recall whether the State made any objections [fol. 69] during the trial. I do not recall whether the defense or the State made any oral motions during the trial.

I recall there was an exhibit entered at the trial, a chart about 10 feet long. It was a diagram of the block where they said the crime was committed. I don't know who introduced that exhibit, the State or the defense. I don't recall any other exhibits that were introduced.

The only other thing that I recall that occurred during the trial was in the last part. The Judge said, "I sentence Edgar Shepard and James Norvell each to 99 years in the penitentiary and Willie Norvell I sentence you to 199 years in the penitentiary." Then the other lawyer asked the Judge to please cut down the time. So the Judge said, "Edgar Shepard and James Norvell I sentence you to 50 years in the penitentiary," but he didn't say anything about me. That is all I recall of the last part of the trial.

I don't know who paid my attorney's fee for defending me in this case. It might have been my grandmother or my aunt. I did not have a penny at the time of trial. I did not have any money after the trial was over and I went to Stateville. I got a little bit of money down there, very [fol. 70] little money, by selling blood. From the time I went down to Stateville in 1941 until today, I have not had any money, except maybe 5 or 10 dollars, something like that, selling blood on projects like the malaria project and doing TB and cancer and different programs like that. But money I never had, say like $700 or $800 or $1,000. Perhaps, I had up to $20 at one time, because I sell blood. Other than that I have had no money since I have been incarcerated.

Cross-examination.

By Mr. Robbins:

I don't remember how long the trial took. I remember my grandmother testified and 2 arresting officers, but what their testimony was I can't recall. I don't know where James Norvell is today. He could be dead. I haven't seen him since he went out of the penitentiary. He and Shepard got out on parole as a result of shorter sentences.

I cannot repeat word for word what I heard any witness say at the trial. I do not recall whether someone testified that they saw a person alive one day and dead the next. I don't think there was a doctor that testified.

[fol. 71] Re-direct examination.

By Mr. Sullivan:

I have never seen Mr. Sullivan or Mr. Pfaff before this afternoon.

July 18, 1961.

Irving Robbins, Assistant State's Attorney: Captain Walter McGloon is now deceased. I have a certificate of death by the County Clerk. Captain LeRoy Steffen is now retired and is living in Florida. There is no process available to bring him back to testify. As to Anton Remenih, who was a witness to the statement of Willie Norvell, State's Attorney's officers could find no trace of him. They were sent to his last known address, 56 Belleview Place, and they could find no trace of Mr. Remenih.

Walter Rusin testified as follows:

Direct examination.

By Mr. Pfaff:

My name is Walter Rusin. I am a retired police officer. I was a police officer in 1941. I do not remember a defendant named Willie Norvell in 1941. Very vaguely I re-

call a crime in which a warehouse watchman was murdered. I do not remember who was charged with that crime.

During my time as a police officer I served as a witness to statements that were given by persons who were arrested. I was present at the time a statement was given [fol. 72] in the case involving the watchman who was murdered. That could have been the statement of Willie Norvell.

I was not called as a witness at the trial of Willie Norvell. I did not attend any portion of the trial. I do not know whether Captain McGloon was called as a witness.

QUAINELLA THOMAS testified as follows:

Direct examination.

By Mr. Pfaff.

My name is Quainella Thomas. I live at 1426 South Keeler. I am the aunt of Willie Norvell. I was not present in the Criminal Court of Cook County in 1941 when Willie Norvell was tried for murder.

RUBEN NORVELL testified as follows:

Direct examination.

By Mr. Pfaff:

My name is Ruby Norvell. I am a sister-in-law of Willie Norvell. I was present in 1941 at the trial of Willie Norvell. I was present during the whole trial.

No one appeared on behalf of the State except the police officers. I do not know their names. Other than the police officers and a member of the family of the deceased, they didn't have any other witnesses.

The police officers testified about having a call to go to [fol. 73] 1958 Hubbard and they would find Willie Norvell there, that he was connected with a robbery somewhere on

Leavitt and Fullerton on a night watchman. They testified they went there. They testified the call was received in August of 1941, I couldn't tell you the exact date. I do not recall any more of the testimony of these police officers.

I do not recall whether the lawyers for Willie Norvell cross examined the police officers. The only witnesses for the defense were Willie's grandmother and me. The grandmother is now deceased.

I testified that the police asked me about the whereabouts of the boys at the time the watchman was killed. To my knowledge I told them James Norvell had just come out of a hospital. I told them Willie Norvell was at home at that time. The State cross examined me.

I don't recall whether any exhibits were introduced on behalf of the State. I don't recall whether the defense offered any exhibits either. I recall the lawyers for Willie made a lot of objections. As to rulings, some they answered, some they didn't. I couldn't tell you whether the State's Attorney made any objections or motions during the trial. I don't remember whether the lawyers for Willie made any motions during the trial, nor do I remember any [fol. 74] comments that the Judge or State's Attorney made.

I am not divorced from Willie Norvell's brother, but we have been separated since 1949. I do not know his address. The last I heard he was in Chicago. I have not seen him since March 24, 1961.

Cross-examination.

By Mr. Robbins:

I recall the name Frank Czecik mentioned during the trial. He was the watchman who found the body. I don't recall whether he testified. I recall some testimony by the State as to the reenactment of the crime by James Norvell and Shepard.

There was testimony about Willie Norvell when they arrested him. They had to chase him. He was in the house when they came. I testified pertaining to that arrest. Willie at that time went out on the porch of another lady's back porch. The police had to pursue him and capture him a couple of days later, maybe a week.

I don't know whether there was any testimony that Willie gave a full and complete confession of his part in this hold up slaying. There were members of the family of the deceased who testified he was alive one day and dead the next.

[fol. 75] August 1, 1961.

EVIDENCE ON BEHALF OF THE STATE

ALBERT J. VACHLON testified as follows:

Direct examination.

By Mr. Robbins:

My name is Albert J. Vachlon. I was a police officer back in 1941 and 1942. I recall very vaguely a case entitled People vs. Willie Norvell. I recall that we had a murder in the district, but I don't recall the investigation. I took part in the chase in that case. That took place some time later. I did not testify in the case. I was not called.

Cross-examination.

By Mr. Sullivan:

I did not attend any part of the trial of Willie Norvell. I was not present at any of it.

MILFORD NYGREN testified as follows:

Direct examination.

By Mr. Robbins:

My name is Milford Nygren. I am a policeman in the City of Chicago. I am assigned to the Chief Clerk's office. I was a police officer in 1941 and 1942. During that time I was assigned to the 27th District. I recall a case during

those years that involved Willie Norvell. I took part in the arrest of Willie Norvell.

As a result of that arrest I was called as a witness [fol. 76] in the ensuing case that was based on indictment No. 41-1473 against Willie Norvell. I don't recall exactly what I testified to at that time. I did not see the deceased's body. I testified about the arrest of Willie Norvell, that is all. That is all I testified about. I know that Willie Norvell received a sentence of 199 years.

Cross-examination.

By Mr. Sullivan:

My rank is patrolman. I don't believe other witnesses were excused from the trial during the testimony of other witnesses. It is my recollection and I am almost certain that I sat through the entire trial.

I think Captain McGloon testified at the trial. I think the owner of the furniture factory where this crime was committed, I don't recall the name, Czyn or Czelmy, or something like that. Other than those two I just can't recall. I can't recall who did testify.

I couldn't say whether or not James Slattery from the 27th District testified. I don't recall whether he did or not. I am almost sure Patrick McNamara from the 27th District testified, but I can't say for sure. George Ruchrich was there but I don't recall whether he testified. Sergeant John Hannon was there, but I can't say whether [fol. 77] he testified. I was at the trial, but I just don't recall anything about it. I don't recall anything that was said in the opening statements. I can't recall what questions were asked of me and what answers I gave at the trial on direct examination. I can't recall the questions and answers on cross examination.

I have no recollection of the testimony given on either direct examination or cross examination by Captain McGloon. I have no recollection of the testimony given by the factory owner either on direct or cross examination. I have no recollection of the testimony given by Officer McNamara either on direct or cross examination. I don't have any recollection of any of the testimony of any of the other witnesses during the course of the trial.

I don't recall whether or not any objections were made in the course of the trial either by the State or by defense counsel. I don't recall any exhibits being introduced into evidence. Beyond what I have testified to, I can't recall what took place at the trial.

JAMES J. MADDEN testified as follows:

Direct examination

By Mr. Robbins:

My name is James J. Madden. I am a detective assigned [fol. 78] to the 6th Area, General Assignment. I was a police officer during the years 1941 and 1942. I was assigned to the 27th District.

I recall an indictment during the course of those two years that involved Willie Norvell. I did not attend the trial resulting from that indictment. I did not testify against any of the defendants at the preliminary hearing or at the regular trial.

ARTHUR SWANSON testified as follows:

Direct examination.

By Mr. Robbins:

My name is Arthur Swanson. I am a retired police officer. I was a police officer during the years 1941 and 1942. At that time I was a patrolman assigned to the 27th District, Warren Avenue.

I have heard tell of the case of murder against Willie Norvell, but I attended no hearing of any kind. I used to work on the desk and in the lock-up and never attended trials.

FURTHER EVIDENCE OF BEHALF OF DEFENDANT

JAMES NORVELL testified as follows:

Direct examination.

By Mr. Pfaff:

I am the same James Norvell who was a defendant in the case of the People vs. Edgar Shepard, Willie Norvell and James Norvell. I attended all phases of that trial back in 1941. My lawyer was Westbrooks. I was present [fol. 79] at all sessions of the trial.

I don't remember any of the opening statements that were made either by the State or by any of the defense attorneys. I don't recall who testified for the State. Some police officers testified. I don't know their names. I don't know what they testified to.

My aunt, Hanna H. Norvell, testified for the defense. Her name was Hanna Davis at that time.

I don't recall whether or not any exhibits were introduced by the State or by the defense. I don't remember whether or not Willie Norvell's attorney made any objections during the trial. I don't know whether the State made any objections during the trial. I can't remember whether the State made any motions during trial. I don't know whether the attorney for Willie Norvell made any motions during the trial. I don't remember the testimony of any witness or any portion of the testimony from any witness. I have no recollection of what transpired other than what I have told you. I did not testify at the trial, nor did my brother. Edgar Shepard did not testify either.

I did not obtain a transcript of the testimony of the proceedings at the trial. I tried to obtain one. That was in [fol. 80] 1941, 1947 and I think 1949. Willie Norvell tried many times to get a transcript. I don't know when, but I know it was quite a few times. I don't think Edgar Shepard ever tried to get a transcript.

Mr. Sullivan: We have now obtained the testimony of all of the persons that we were able to determine were present

at the trial. I would like to have the State stipulate that if Mr. Norvell were recalled as a witness he would testify that shortly after his incarceration in the penitentiary pursuant to the conviction in this case, he made inquiry of the Official Shorthand Reporter concerning his obtaining a transcript, and what was necessary for him to obtain the transcript, both as to whether or not he could get it without the payment of costs and if costs were necessary what the charges would be.

The Court: And you would further stipulate that because of his indigence he was unable to come up with the cost of the transcript?

Mr. Sullivan: Yes, your Honor. And he has already testified to his indigency.

The Court: I see no harm in that. Do you so stipulate? [fol. 81] Mr. Robbins: Yes.

Certificate of Hon. Joseph W. Drucker to report of proceedings, December 8, 1961.

Certificate of Clerk of the Criminal Court of Cook County, dated December 11, 1961.

Respectfully submitted, Thomas P. Sullivan, Robert E. Pfaff, Attorneys for Plaintiff in Error Willie Norvell.

[fol. 82] IN THE SUPREME COURT OF THE STATE OF ILLINOIS

Present: Harry B. Hershey, Chief Justice.
Justice Joseph E. Daily, Justice Ray I. Klingbiel, Justice Roy J. Solfisburg, Jr., Justice Walter V. Schaefer, Justice Byron O. House, Justice Robert C. Underwood.
William G. Clark, Attorney General.
Robert G. Miley, Marshal.

ATTEST: Mrs. Earle Benjamin Searcy, Clerk.

[fol. 83] Docket No. 36830

Agenda 31

March, 1962

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

v.

WILLIE NORVELL, Plaintiff in Error

OPINION—Filed May 25, 1962

Mr. Justice House delivered the opinion of the court:

On November 3, 1941, after a three-day bench trial, the criminal court of Cook County found defendant guilty of murder and sentenced him to the penitentiary for a term of 199 years. The People have stipulated that defendant would testify that immediately after his conviction he made efforts to obtain a stenographic transcript of the trial proceedings for the purpose of having his conviction reviewed and that a transcript was not furnished because he could not pay for it. In 1956, after Rule 65—1(2) had been adopted, the criminal court ordered the official court reporter to furnish defendant, without cost, a complete stenographic transcript of the entire trial proceedings because such a transcript was necessary to fully present for review alleged errors in his trial. Only a portion of the transcript has been furnished to defendant.

The defendant's trial was conducted on October 29, 30 and November 3, of 1941. E. M. Allen was the court reporter of the trial on October 30 and the morning of November 3. Gerald J. Healy was the court reporter of the trial on October 30 and the afternoon of November 3. Healy transcribed his stenographic notes and a copy of that transcript has been furnished to defendant. The stenographic notes made by E. M. Allen, who died on August 26, 1949, have never been transcribed. A hearing was conducted to determine whether Allen's notes could be transcribed or a bystanders report of proceedings constructed.

After it was determined that the stenographic notes of E. M. Allen could not be transcribed and that a bystanders report of proceedings could not be constructed for the portions of the trial attended by Allen defendant moved for a new trial. This motion was denied and defendant sued out this writ of error.

Defendant asserts that in *Griffin* v. *Illinois*, 351 U.S. 12, 76 C. Ct. 585, 100 L. ed. 891, the Supreme Court held that where a State provides for review of alleged errors in a criminal trial which can be reviewed only by a transcript of proceedings at the trial, the State denies a constitutional right of an indigent defendant when it fails to furnish him with a free transcript or other suitable means for such review; that the court in *Eskridge* v. *Washington State Board* [fol. 84] *of Prison Terms and Paroles*, 357 U.S. 214, 78 S. Ct. 1061, 2 L. ed. 2d 1269, held that the ruling of the *Griffin* case was applicable even though an indigent defendant now seeking a transcript had been convicted and sentenced long before the *Griffin* case; that he was indigent when sentenced and requested a free transcript; that this request was denied; that his constitutional right to now have his conviction fully reviewed has been denied; and that his conviction must therefore be set aside and a new trial granted, which if it results in conviction, can be fully reviewed.

A similar assertion was made in *People* v. *Berman*, 19 Ill. 2d 579, where it was impossible to furnish defendant with a transcript of his trial because no stenographic notes of the proceedings had been made. We held that since it was not defendant's indigency which now prevented us from reviewing his conviction, the constitutional right announced in the *Griffin* case had not been denied. The Supreme Court

of the United States thereafter denied Berman's petition for writ of *certiorari*. (365 U.S. 804, 81 S. Ct. 472.) The defendant points out, however, that the United States Supreme Court subsequently denied a petition for writ of *certiorari* (82 S. Ct. 59, 7 L. ed 2d 39.) in the case of *Patterson* v. *Medberry*, 290 F.2d 275, where the United States Court of Appeals for the Tenth Circuit held that because an indigent defendant's 1939 trial could not be reviewed, a transcript of that trial being unavailable, the defendant must be given a new trial within six months or released from prison. Because the Court of Appeals for the Tenth Circuit, and probably the Seventh Circuit, (See *United States ex rel. Westbrook* v. *Randolph*, 259 F.2d 215) have given the *Griffin* and *Eskridge* cases an interpretation different from our interpretation (see *People* v. *Berman*, 19 Ill.2d 579,) we give the question further consideration.

On April 23, 1956, the United States Supreme Court held that a State denies a constitutional right guaranteed by the fourteenth amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials. (*Griffin* v. *Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. ed. 891.) The effect of this decision was to invalidate any financial barriers imposed by the State which restrict the availability of appellate review for indigent defendants. (See *Burns* v. *Ohio*, 360 U.S. 252, 79 S. Ct. 1164, 3 L. ed. 2d 1209; *Smith* v. *Bennett*, 365 U.S. 708; 81 S. Ct. 895.) In the *Eskridge* case the court did not hold that the failure to furnish defendant [fol. 85] with a free transcript in 1935 denied him a right guaranteed by the fourteenth amendment, but held that the failure in 1956 to furnish him with a free transcript which was still available denied him of such a right. This holding made it clear that such financial barriers could no longer be imposed by the State even though the indigent defendant was sentenced prior to the time restrictions were invalidated. We had, of course, already removed financial barriers which prevented indigent defendants sentenced prior to the *Griffin* case from now securing free transcript if it is possible to obtain them. Ill. Rev. Stat. 1957, chap. 110, par. 101.65—1(2).

There is no indication in the *Griffin or Eskridge* cases however that the financial barriers then and there announced to be invalid were always invalid restrictions. The

economic restrictions invalidated by the *Griffin* decision were, of course, imposed by statutes, application of statutes, court rules and court decisions. It is apparent that the retroactive invalidity of these restrictions must be examined in the light of those considerations which dictate the retroactive invalidity of a statute or prior court decision.

The court in *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. ed. 329, did point out that the invalidation of a statute cannot justify an all-inclusive statement of a principle of absolute retroactive invalidity. The court was there asked to rule upon the validity of a final decree entered pursuant to an act of Congress prior to the time the act was declared to be unconstitutional by the court. In commenting on the retroactive invalidity of the act, the court stated: "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. * * * It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and [fol. 86] of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." (308 U.S. at 374, 60 S. Ct. at 318-319.) The court went on to hold the decree valid.

The actual existence and operative effect of the economic barriers which restricted the availability of appellate review for indigent defendants prior to the *Griffin* case is a fact which cannot be ignored. The invalidation of these economic restrictions could not undo the consequences already suffered as a result of their existence and operation. These

actualities dictate that only prospective effect be given to the invalidation of such restrictions.

We are of the opinion that the intent, purpose and effect of the *Griffin* decision was to merely invalidate all existing financial barriers imposed by the State which restricted the availability of appellate review for indigent defendants and were not to otherwise affect final judgments of conviction. (*People* v. *Berman*, 19 Ill.2d 579; Cf. *Chicot Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. ed. 329.) The judgment of the criminal court of Cook County denying defendant's motion for a new trial is affirmed.

Judgment affirmed.

[fol. 87] In the Supreme Court of the State of Illinois

Present: Harry B. Hershey, Chief Justice.

Justice Joseph E. Daily, Justice Ray I. Klingbiel, Justice Roy J. Solfisburg, Jr., Justice Walter V. Schaefer, Justice Byron O. House, Justice Robert C. Underwood.

William G. Clark, Attorney General.

Robert G. Miley, Marshal.

Attest: Mrs. Earle Benjamin Searcy, Clerk.

No. 36830

People State of Illinois, Defendant in Error,

vs.

Willie Norvell, (Impleaded) Plaintiff in Error

Error to Criminal Court, Cook County, 41-1473

Judgment—May 25, 1962

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceeding aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition

of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Criminal Court of Cook County aforesaid, be Affirmed in all Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 14th day of June, 1962. (Seal)

/s/ Mrs. Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois.

[fol. 88] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 89] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1962

No. 413 Misc.

WILLIE NORVELL, Petitioner,

vs.

ILLINOIS

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI —OCTOBER 15, 1962.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 513 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 513

WILLIE NORVELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S BRIEF

THOMAS P. SULLIVAN
ROBERT E. PFAFF
135 S. LaSalle Street
Chicago 3, Illinois
Attorneys for Petitioner, Willie Norvell

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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Opinion Below

The opinion of the Supreme Court of Illinois, reported at 25 Ill. 2d 169, 182 N.E. 2d 719, is printed at pages 51 to 55 of the Transcript of Record. The Criminal Court of Cook County, Illinois rendered no opinion in this cause.

Jurisdiction

The opinion and judgment of the Supreme Court of Illinois, affirming the judgment of the Criminal Court of Cook County, Illinois, were entered May 25, 1962. (Tr. 51-56.)* The petition for writ of certiorari was granted October 15, 1962. (Tr. 57.) The jurisdiction of this court is invoked under 28 U.S.C. §1257 (3).

* "Tr." refers to the printed Transcript of Record on file in this Court.

Questions Presented

1. Has the Supreme Court of Illinois decided this case in a way that conflicts with *Eskridge* v. *Washington State Board*, 357 U.S. 214 (1958), by holding that "only prospective effect" should be given to *Griffin* v. *Illinois*, 351 U.S. 12 (1956)?

2. Has the Supreme Court of Illinois decided this case in a way that conflicts with the opinions of the Courts of Appeals for the Seventh and Tenth Circuits in *U. S. ex rel. Westbrook* v. *Randolph*, 259 F. 2d 215 (7th Cir. 1958), and *Patterson* v. *Medberry*, 290 F. 2d 275 (10th Cir. 1961)?

3. Where Illinois, through its own fault, and through no fault of a convicted indigent defendant, is unable to provide appellate review to the defendant because of the lack of a transcript of the trial, do the Due Process and Equal Protection clauses of the Fourteenth Amendment require that the defendant be given a new trial?

4. Since Illinois provides free stenographic transcripts and appellate review as of right to indigent defendants convicted prior to the date of this Court's decision in the *Griffin* case, may Illinois refuse to grant relief to an indigent defendant who, through no fault of his own, cannot be provided a transcript on which to base appellate review?

Or do the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that such a defendant be awarded a new trial?

Constitutional Provision, Statute and Rule Involved

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution, Section 771 of the Illinois Criminal Code, and Rule 65—1 (2) of the Rules of the Supreme Court of Illinois, the full texts of which are set forth in Appendix A to this brief, pages 35 to 38.

STATEMENT

PETITIONER'S TRIAL AND CONVICTION

In September, 1941, petitioner Willie Norvell was indicted, together with James Norvell and Edgar Shepard, in Cook County, Illinois, for the murder of Michael Hetman on August 17, 1941. Petitioner, who was 18 years of age at the time, entered a plea of not guilty and waived trial by jury. He was represented by counsel retained by his family.

The case was tried in the Criminal Court of Cook County before Judge Edgar A. Jonas (sitting without a jury) on October 29 and 30, and November 3, 1941. The three defendants were tried together. Judge Jonas found all three guilty. After denial of petitioner's oral motions for new trial and arrest of judgment, he was sentenced to the Illinois State Penitentiary for a term of 199 years. James Norvell and Shepard each received a sentence of 50 years. (Tr. 1-2, 35, 39.)

PETITIONER'S PROMPT ATTEMPT TO OBTAIN THE TRIAL TRANSCRIPT

At the time of his conviction, petitioner made inquiries of the Official Reporters with respect to the method and cost of obtaining the transcript of the trial, and, on his motion, the trial court extended the time for presentation and certification of the transcript for 90 days. (Tr. 2.)*

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* In 1941, an Illinois statute provided for the appointment, official oath, duties and compensation of Official Court Reporters "who shall be skilled in verbatim reporting." The statute provided that the State was to pay the reporters' salaries, and it fixed charges for preparing transcripts. The statute also gave the trial judge power to order preparation of a transcript and direct that payment of the reporter's charges be taxed "in such manner as to him may seem just." (Ch. 38, §§163a and 163b, Ill. Rev. Stat. 1939.) A rule of the Illinois Supreme Court required that the transcript be certified by the trial judge and filed within 50 (later changed to 100) days after judgment. (Ch. 110, §259.70A, Ill. Rev. Stat. 1939.)

Although petitioner was indigent, his family retained an attorney for the trial, but no money was available with which to purchase from the Official Reporters a transcript of the testimony at his trial. The State of Illinois did not afford a means by which indigent defendants could obtain trial transcripts without payment of costs. Accordingly, he could not prosecute a writ of error from the judgment of conviction, or otherwise obtain judicial review of his trial. (Tr. 36-37, 42, 49-50.)

Nevertheless, petitioner continued to make efforts to obtain a transcript for appeal. (Tr. 49.) In 1952 he filed a motion to obtain the records of his trial, but the motion was denied. (Tr. 2.)

PETITIONER'S APPLICATION FOR THE TRIAL TRANSCRIPT UNDER ILLINOIS SUPREME COURT RULE 65-1(2)

On April 12, 1956, this Court announced in *Griffin* v. *Illinois*, 351 U.S. 12, that Illinois' failure to afford the means of appellate review to indigent persons convicted of crime violated the Due Process and Equal Protection Clauses. The Supreme Court of Illinois soon thereafter promulgated Rule 65-1, to conform Illinois procedures to Constitutional mandates. See *People* v. *Griffin*, 9 Ill. 2d 164, 137 N.E. 2d 485 (1956).

On November 19, 1956 petitioner filed a verified petition in the trial court pursuant to Rule 65-1(2) (the full text of which is set forth in Appendix A, pp. 35 to 38), requesting that he be furnished with a stenographic transcript of the report of proceedings of his trial.*

On December 4, 1956, an order was entered by Judge Wilbert F. Crowley finding (a) that petitioner was indigent

* For reasons not disclosed, no copy of this petition is contained in the record in this case.

both at the time of his conviction and at the time of filing his petition, and (b) that a stenographic transcript of the trial was necessary to present fully to a reviewing court the errors alleged in the petition. The Official Shorthand Reporter was ordered to transcribe his notes and furnish petitioner with a copy of the transcript without cost within a reasonable time. (Tr. 2-3.)

PETITIONER IS GIVEN A PARTIAL TRANSCRIPT

No action was taken in compliance with the order of December 4, 1956, until March, 1961 (after petitioner's present counsel were appointed by the Illinois Supreme Court). At that time, petitioner was furnished with a partial transcript of his 1941 trial, namely, a transcript of all of the proceedings held on October 30, 1941, and of a portion of the proceedings held on November 3, 1941, for which Mr. Gerald J. Healy served as Official Court Reporter. (Tr. 7-35.)

Mr. Healy reported that the Official Reporter at the remainder of the trial, Mr. E. M. Allen, was dead. Mr. Allen reported petitioner's trial all day October 29, and part of November 3, 1941. (Tr. 6.)

The transcript provided by Mr. Healy does not include any of the evidence introduced by the State during its case in chief.

The transcript contains some of the evidence introduced by the defendants (Ruby Lee Norvell, Tr. 7-9; Hanna Davis, Tr. 10-11; Hattie Williams, Tr. 11-13; Dr. William H. Haines, Tr. 13), and the State's rebuttal evidence (Dr. Haines, Tr. 14-20). From this testimony, it appears that petitioner was a mental defective who, from an early age, was subject to delusions and given to bizarre

conduct. The partial transcript contains a copy of a written confession which petitioner allegedly made (Tr. 21-35), but *there is no testimony concerning the confession:* The only references to the confession appearing in the partial transcript are (i) an order denying a motion to suppress confessions (Tr. 21), and (ii) colloquy between the trial judge and the Assistant State's Attorney at the conclusion of all of the proof, in which the trial judge warned that serious objections were raised to the admissibility of the confessions and "that if the confessions as to two of these boys are stricken, there is no testimony whatsoever against them outside of the verbal statements, if they are in the record, that incriminate these boys." The prosecutor said he recalled that there was evidence of a verbal confession by petitioner, testified to by Officer Nygren (Tr. 20), but this testimony is not in the partial transcript.

PETITIONER'S MOTION FOR A NARRATIVE TRIAL TRANSCRIPT OR FOR A NEW TRIAL

Upon receipt of this partial transcript, petitioner filed a motion in the trial court asking that hearings be held to determine whether Mr. Allen's notes were still in existence and, if so, whether they could be transcribed. Petitioner moved that if Mr. Allen's notes could not be transcribed, an adequate and complete narrative or bystanders' bill of exceptions be constructed, so that he could appeal. Petitioner also moved that he be awarded a new trial in the event it was found to be impossible to procure either a stenographic transcript of the trial or an adequate narrative transcript. (Tr. 3-5.)

Pursuant to petitioner's motion, hearings were held in the Criminal Court of Cook County during June, July and August, 1961, before Judge Richard B. Austin. (Tr. 5, 35-50.)

THE COMPLETE TRANSCRIPT CANNOT BE COMPILED.

Ned Hosford, Jr., an Official Court Reporter of the Criminal Court of Cook County for the past 14 years, produced the notebook containing the shorthand notes taken by E. M. Allen of petitioner's trial on October 29, 1941. (Tr. 36.) Mr. Hosford testified that Mr. Allen used the Munson system of shorthand; that the Munson system is no longer taught or used in Chicago; that Mr. Allen incorporated many arbitrary symbols of his own into his shorthand notes, making it practically impossible even for other Munson reporters to read the notes; and that he does not know of any living court reporter who uses the Munson system. (Tr. 37.)

Judge Austin stated that "I am convinced as a result of my investigation and connection with the *Bragg* case* that there is probably no one in the country who can transcribe Mr. Allen's notes." (Tr. 37.)

An effort was then made to reconstruct the transcript through the testimony of persons who attended the trial. Ten witnesses testified, including petitioner, his brother, Officer Nygren (who allegedly had testified to petitioner's oral confession), and a number of other Chicago policemen. ***None of the witnesses was able to recall any of the proof introduced at the 1941 trial.*** (Tr. 38-49.)

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* Judge Austin was referring to *People* v. *Oscar Bragg*, a case which involved the same question as the case at bar. The Illinois Supreme Court ordered that efforts should be made to transcribe Mr. Allen's notes (16 Ill. 2d 336, 157 N.E. 2d 57 (1959)). Judge Austin, who helped to prosecute Bragg in 1940, was a witness at the hearings on remand, at which time he learned of the extensive but unsuccessful efforts made by Bragg's counsel (petitioner's counsel here) and the State's Attorney to transcribe Mr. Allen's notes. The hearings to reconstruct the Bragg trial transcript proved unsuccessful; the trial court denied Bragg's motion for new trial; Bragg died while the case was pending on appeal in the Supreme Court of Illinois (Docket No. 35977), whereupon the case became moot and the appeal was dismissed. See also *People* v. *McKee*, 25 Ill. 2d 553, 185 N.E. 2d 682 (1962).

The State stipulated that immediately after his trial in 1941, petitioner tried to obtain the transcript for appeal, but he could not do so because he had no funds. (Tr. 49-50.)

PETITIONER'S MOTION FOR NEW TRIAL DENIED—AFFIRMED BY THE SUPREME COURT OF ILLINOIS

At the conclusion of the hearings on August 1, 1961, Judge Austin entered an order denying petitioner's motion for new trial. (Tr. 5.)

Petitioner sought review of this order in the Supreme Court of Illinois. He contended that the refusal to grant him a new trial violated his rights under the Due Process and Equal Protection Clauses of the 14th Amendment to the federal Constitution.

On May 25, 1962, the Supreme Court of Illinois rendered its opinion and judgment affirming the order of the Criminal Court of Cook County. (Tr. 51-56.)

In the course of its opinion, the court said (Tr. 53):

> "Because the Court of Appeals for the Tenth Circuit [referring to *Patterson* v. *Medberry*, 290 F. 2d 275 (10 Cir. 1961)], and probably the Seventh Circuit, (See *United States ex rel. Westbrook* v. *Randolph*, 259 F. 2d 215) have given the *Griffin* and *Eskridge* cases an interpretation different from our interpretation (see *People* v. *Berman*, 19 Ill. 2d 579,) we give the question further consideration."

After discussing and quoting from this Court's opinion in *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940), the Supreme Court of Illinois concluded (Tr. 54-55):

> "The actual existence and operative effect of the economic barriers which restricted the availability of appellate review for indigent defendants prior to the *Griffin* case is a fact which cannot be ignored. The

invalidation of these economic restrictions could not undo the consequences already suffered as a result of their existence and operation. These actualities dictate that only prospective effect be given to the invalidation of such restrictions.

"We are of the opinion that the intent, purpose and effect of the *Griffin* decision was to merely invalidate all existing financial barriers imposed by the State which restricted the availability of appellate review for indigent defendants and were not to otherwise affect final judgments of conviction. (*People* v. *Berman*, 19 Ill. 2d 579; Cf. *Chicot Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. ed. 329.) The judgment of the criminal court of Cook County denying defendant's motion for a new trial is affirmed."

Petitioner's petition to this Court for a writ of certiorari to the Supreme Court of Illinois was granted on October 15, 1962, and petitioner was granted leave to proceed as a pauper.*

Petitioner asks that this Court reverse the decision of the Supreme Court of Illinois, and order Illinois to grant petitioner a new trial.

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* The Clerk of this Court has printed the Transcript of Record. Petitioner's appointed counsel have paid for the printing of petitioner's briefs in this Court and in the Supreme Court of Illinois.

A SUMMARY OF UNDISPUTED FACTS

The following facts appear without dispute from the record in this case:

1. Petitioner was indigent at the time of his conviction. He has at all times continued to be, and is now, a pauper. (Tr. 36-37, 42, 49-50.) Accordingly, he could never purchase a transcript of the testimony at his trial, and under the practice followed in Illinois prior to the promulgation of Rule 65-1 on September 26, 1956, it would have been fruitless for him to have sought to be furnished with a transcript at the State's expense. Nevertheless, petitioner desired and attempted to appeal, and he took steps to obtain a trial transcript, but he was unsuccessful, solely because he was a pauper.

2. Illinois delayed for 15 years after petitioner's trial before it took steps to make its system of appeals available to petitioner so that he could seek appellate review and reversal of his trial, conviction and 199 year sentence.

3. After Rule 65-1(2) of the Rules of the Illinois Supreme Court was put into operation in 1956, petitioner filed a timely verified petition that he be supplied with a transcript of the testimony at his trial. This petition was not resisted by the State. Its sufficiency has never been challenged.

4. Petitioner exercised the same degree of diligence in seeking a free transcript of the testimony of his trial as the many other convicted prisoners who have been successful in obtaining free transcripts pursuant to Rule 65-1(2).

5. After considering petitioner's petition, the Chief Justice of the Criminal Court of Cook County entered an

order finding (a) that at the time of his conviction and at the time of filing his petition petitioner was without financial means to pay for the cost of a stenographic transcript of the proceedings at his trial, and (b) that a stenographic transcript of all the proceedings at petitioner's trial would be necessary to present fully the errors recited in his petition. The court ordered the Official Reporter to transcribe his notes of petitioner's trial. (Tr. 2-3.)

6. Thereafter, a partial transcript was certified and filed (Tr. 7-35), but because of the death of one of the Official Reporters whose notes could not be read, the State reported that the balance of the transcript—including all of the State's evidence in chief—could not be transcribed.

7. No adequate narrative transcript or bystanders' bill of exceptions of petitioner's trial can now be compiled.

8. *Petitioner's inability to obtain appellate review of his trial and conviction has arisen through no fault of petitioner, but solely because of Illinois' delay in conforming its procedures to the requirements of the 14th Amendment to the federal Constitution.*

SUMMARY OF ARGUMENT.

Under Illinois law, convicted criminal defendants have a right to appellate review of their convictions. The Supreme Court of Illinois has implemented the decision of this Court in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), by adoption of Rule 65-1, which provides that the State will furnish a free trial transcript to every indigent person convicted of crime, regardless of whether he was convicted before or after the *Griffin* decision. (Part I, pp. 13 to 15.)

Petitioner, who was convicted in 1941, cannot obtain a complete transcript of his trial because one of the Official Court Reporters who attended the trial is dead and the stenographic notes are illegible. Accordingly, petitioner is unable to exercise his right to appellate review. Petitioner's present plight was caused through no fault of his, but rather by Illinois' failure to conform its procedures to the mandates of the federal Constitution while it was still able to furnish petitioner with a complete trial transcript so that he could appeal. (Part II, pp. 16 to 21.)

The dilemma presented by this case can be solved only by awarding petitioner a new trial. This is the relief which was awarded by the Courts of Appeals for the Seventh and Tenth Circuits in similar cases involving indigent defendants convicted before *Griffin* who were unable to obtain trial transcripts through no fault of their own. Petitioner at bar is entitled to the same relief. Indeed, in two recent cases the Illinois Supreme Court awarded new trials when indigent defendants were unable to obtain trial transcripts. Petitioner should be afforded the same protection of Illinois law which was extended to those defendants. (Parts III and IV, pp. 21 to 26.)

Courts of other jurisdictions uniformly award new trials in criminal and civil cases where, through no fault of the would-be appellant, an adequate record upon which to premise review cannot be obtained. (Part V, pp. 26 to 32.)

Many cases in which Illinois defendants have obtained free trial transcripts under Rule 65-1 have been reversed outright or have been reversed and remanded for new trials. This demonstrates the need for appellate review of *all* Illinois convictions. The only way in which petitioner's constitutional right can be protected, and a grave injustice averted, is by awarding petitioner a new trial which, if it results in a conviction, may be reviewed. (Part VI, p. 33.)

ARGUMENT.

I.

APPELLATE REVIEW OF CRIMINAL CONVICTIONS IS AN INTEGRAL PART OF PROCEDURAL DUE PROCESS IN ILLINOIS, FOR THE INDIGENT AS WELL AS THE WEALTHY.

In 1941, when petitioner was tried, the Illinois Criminal Code provided (as it does today) that each person convicted of crime has the *right* to appellate review of his conviction by writ of error (Ch. 38, § 771, Ill. Rev. Stat. 1939; Appendix A, p. 35).

It was this same statute which gave rise to this Court's historic decision in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). A resume of that decision, and its aftereffects, is helpful in considering the case at bar.

The Griffin Case.

Griffin v. *Illinois*, 351 U.S. 12 (1956), concerned men who, like petitioner, were unable to obtain appellate review of their convictions at the time they were convicted, because they had no money with which to purchase a transcript of the trial proceedings. This Court held that since Illinois provides a right to appellate review in all criminal cases, every convicted person, regardless of his financial circumstances, must be afforded a genuine opportunity to have his trial scrutinized by an appellate court. Both the Due Process and Equal Protection Clauses of the federal Constitution require that Illinois make its system of appellate review of criminal convictions fully and practically

available to all persons convicted of crime, be they wealthy or poor (351 U.S. at 18-19):

> ". . . Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. [Citing cases.]
>
> ". . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

The Eskridge Case.

In *Eskridge* v. *Washington*, 357 U.S. 214 (1958), this Court held that the *Griffin* principle applies to men convicted before as well as after the date of the *Griffin* decision.

These cases made it clear that the federal Constitution requires Illinois to provide the means of appellate review to indigent persons convicted of crime, whether they were convicted before or after the *Griffin* decision.

Adoption of Illinois Supreme Court Rule 65-1.

Obedient to the mandate of this Court, the Supreme Court of Illinois on September 26, 1956 promulgated Rule 65-1, setting forth the procedure to be followed by convicted indigent defendants who desire to obtain a transcript of testimony without payment of cost. In so doing, the court recognized the "highly desirable" advance marked by the new rule. *People* v. *Griffin*, 9 Ill. 2d 164, 166 (1956).

Anticipating this Court's holding in *Eskridge,* the court gave Rule 65-1 full retroactive effect in subsection (2), saying (9 Ill. 2d at 167):

> "We have considered the applicability of doctrines of waiver. Our rules require that reports of proceedings at the trial be presented to the trial judge for approval within 100 days from the entry of judgment, or within the extended period fixed by the trial judge. It could be held that a prisoner who did not request a free transcript within the time so fixed has waived his right. But waiver assumes knowledge, and we are unwilling to hold, under the circumstances of this case, that the constitutional rights of prisoners have been waived. . . ."

Rule 65-1(2) applies to paupers convicted before *Griffin;* Rule 65-1(1) applies to those convicted after *Griffin.* All are entitled to a *gratis* trial transcript for appeal.

Thus, whether convicted before or after the announcement of the *Griffin* decision, and whether or not they had sought a free transcript at the time of their trials, convicted indigent defendants are entitled to have free transcripts furnished by the State of Illinois, and they are then entitled to seek and obtain review of their convictions by the Supreme Court of Illinois.

We now turn to the application of these authorities to the case at bar.

II.

SINCE, THROUGH NO FAULT OF PETITIONER, AN ADEQUATE TRANSCRIPT IS NOT AVAILABLE UPON WHICH TO BASE APPELLATE REVIEW OF HIS TRIAL, ILLINOIS MUST GRANT HIM A NEW TRIAL.

A.

Illinois Proximately Caused the Dilemma Presented by This Case, and Should Bear the Burden of Its Own Derelictions.

Although the complete process of law in criminal cases in Illinois includes appellate review of the trial following conviction, until forced to do so by this Court in 1956, Illinois refused to grant equal means of appellate review to defendants who were indigent and therefore were unable to purchase the typewritten report of proceedings.

The failure of Illinois to provide a means of appeal to petitioner in 1941 was a violation of his constitutional rights, notwithstanding that the breach was not exposed and articulated until 1956 in the *Griffin* case.

Rule 65-1(1) of the Illinois Supreme Court applies to the future. *Rule 65-1(2)* (Appendix A, pp. 35 to 38), *relating to past cases such as petitioner's, is designed to put the indigent convicted defendant in precisely the position he would have been in if, at the time he was convicted, a transcript had been available to him despite his poverty.* Rule 65-1(2) is fully retroactive, operating without regard to when the defendant was convicted or whether he tried to get a free transcript at the time of his conviction.

For most prisoners convicted before Rule 65-1-(2) was promulgated, the lapse of time between their trials and

enactment of the new rule meant only that judicial review of the trial—and possible reversal—was delayed. Almost all of those men have by now had appellate review; many convictions have been set aside (see Appendix B, pp. 39 to 46).

But for a few convicted paupers, Illinois' delay in making the complete process of law available to them has been found to be fatal to their opportunity to obtain the promised review. So it is with petitioner. Although he was more diligent in seeking a transcript than most of those who have secured reversals, he can never obtain review of his trial, for it has been discovered that one of the Official Court Reporters died during the period when Illinois still discriminated against the poor, and that the deceased reporter's notes are illegible. The judicial proceedings brought against petitioner in 1941 have never been—and now cannot be—completed.

Petitioner submits that Illinois' delay in conforming its procedures to the mandates of the federal Constitution proximately caused petitioner's present inability to obtain appellate review of his trial. But for that delay, petitioner would have obtained the review to which he concededly has a constitutional right.

We submit that the State must now put petitioner in the position he would have been in if, at the time of his trial, the transcript became unavailable through delays occasioned by the State. Under these circumstances, a new trial would clearly be required both by the Due Process and Equal Protection Clauses of the 14th Amendment.

Petitioner may not now be forced to accept unequal treatment and less than full process of Illinois law because the State, in violation of the federal Constitution, delayed until after Official Reporter Allen's death in making a free transcript available to petitioner.

B.

The Court Below Misapplied The Principle Of The Chicot Drainage Case.

The reliance of the court below on this Court's decision in the *Chicot* case (*Chicot Drainage District* v. *Baxter State Bank*, 308 U.S. 371) is entirely misplaced. The *Chicot* case involved application of the doctrine of *res judicata* following the declaration of unconstitutionality of the statute on which a prior civil decree affecting property rights was based. Faced with considerations of good faith and reliance, this Court ruled that the decree would not be affected.

No statute or decree is involved here, nor is the doctrine of *res judicata*. What is involved is the question whether petitioner's incarceration under a non-reviewable conviction must continue despite the fact that petitioner's inability to appeal was brought about by Illinois' unconstitutional conduct in refusing to make the transcript available to him during E. M. Allen's lifetime, and through no fault of petitioner's.

C.

No Reasonable Distinction Can Be Drawn Between Petitioner and Other Defendants Convicted Prior to Griffin For Whom Stenographic Transcripts Are Available.

The Illinois Supreme Court's decision is premised on the assumption that a reasonable classification may be made between indigent defendants convicted before April 23, 1956 who can obtain a stenographic transcript of the proceedings had at their trials, and those who cannot obtain a transcript or an acceptable substitute upon which to base an appeal.

Petitioner submits that this classification is unreasonable and capricious, and denies to petitioner equal protection of Illinois law, and deprives him of his liberty without due process of the law.

All indigent defendants convicted in Illinois prior to *Griffin* share the following common characteristics:

(1) The Illinois Criminal Code (Ch. 38, § 771, Ill. Rev. Stat. 1939) granted to all of these defendants appellate review as a matter of right.

(2) Each defendant was indigent at the time of his conviction and immediately thereafter.

(3) Solely by reason of his indigence, each defendant was prevented from obtaining a stenographic transcript of his trial proceedings, and was thereby prevented from obtaining appellate review of his conviction on the merits at the time of his trial.

(4) None of these defendants has waived his right to claim that he was prevented by his indigence from obtaining appellate review of his conviction. *Eskridge* v. *Washington State Board*, 357 U.S. 214 (1958); *People* v. *Griffin*, 9 Ill. 2d 164, 167-168 (1956).

(5) The requirement of the Illinois Supreme Court Rules—that the report of proceedings must be certified by the trial court within a specified time from the date of the judgment—has been withdrawn for all of these defendants.

(6) Each of these defendants is entitled to apply for and receive a trial transcript, without cost, under Illinois Supreme Court Rule 65-1.

The sole factor which differentiates petitioner from other members of the class is that, because one of the Official Reporters who attended his trial has died (some 8 years after petitioner's conviction) and his notes cannot be tran-

scribed, Illinois is now unable to provide him with a complete stenographic transcript of the trial.

But the unalterable fact is that this situation was created by the failure of Illinois to conform its procedures to the mandates of the federal Constitution until it was no longer able to furnish petitioner with the means upon which to premise appellate review of his conviction.

Men in the position of petitioner are no less entitled to full procedural due process than those whose Official Reporters still live or whose Official Reporters took legible shorthand notes. The distinction drawn by the court below is arbitrary and unfair.

If Illinois in 1941 had accorded all indigent defendants their full rights by supplying transcripts of their trials, petitioner would have obtained appellate review of his conviction. An outright reversal would have been ordered if the State's proof failed to convey to the reviewing court an "abiding conviction" of petitioner's guilt. Petitioner would have obtained a new trial if the reviewing court found that the evidence was insufficient to support the verdict or that prejudicial trial errors occurred.*

There is no rational basis for assuming that petitioner's appeal will be less meritorious than any other appellant seeking review of his criminal conviction.

We agree with the Illinois Supreme Court that "the consequences already suffered" as a result of the unconstitutional "economic restrictions" imposed by Illinois before 1956 can no longer be undone. Mr. Allen cannot be

* Since petitioner's motion for new trial was made orally (Tr. 35), he would be free on appeal to argue any error appearing in the record. *People* v. *Flynn*, 8 Ill. 2d 116, 118, 133 N.E. 2d 257, 259 (1956).

resurrected; his notes are forever illegible. Nor can Illinois give back to petitioner the lifetime he has spent behind bars. But it does not follow that the wrong which was visited upon petitioner by Illinois during Mr. Allen's lifetime—*viz.*, the failure to furnish the transcript without cost—must go completely uncorrected; but now the only means of redress is by awarding petitioner a new trial. He should not be required to spend the rest of his life in prison under a conviction which may well have been set aside on appeal, but which *through the fault of the State* is forever non-reviewable.

In short, Illinois' unconstitutional conduct first prevented and now has foreclosed petitioner from exercising his *right* to appellate review of his trial. Only by granting petitioner a new trial may he be afforded the full measure of justice which is guaranteed to him by the federal Constitution and the Illinois Criminal Code.

III.

THE COURTS OF APPEALS FOR THE SEVENTH AND TENTH CIRCUITS HAVE CORRECTLY AWARDED NEW TRIALS UNDER THESE CIRCUMSTANCES.

Under precisely these circumstances, the Courts of Appeals for the Seventh and Tenth Circuits have awarded new trials.

The Medberry Case

In *Patterson, Warden* v. *Medberry*, 290 F. 2d 275 (10th Cir. 1961), *certiorari denied* 368 U.S. 839, *rehearing denied*, 368 U.S. 922 (Nov. 21, 1961), Medberry, a pauper, was convicted of murder in a Colorado court in June, 1939, and sentenced to life imprisonment. He filed a notice of appeal and requested that he be furnished with a free transcript of the trial proceedings. The trial court denied his request for a transcript. His appeal went forward on the

common law record; the Colorado Supreme Court affirmed, holding that the trial court had not erred in refusing to have a transcript prepared at public expense. (107 Col. 15, 108 P. 2d 243 (1940)).

In 1958, following the decision in the *Griffin* case, Medberry began proceedings to obtain a transcript for appeal, or a new trial if no transcript was furnished. It was then learned that a transcript of Medberry's original trial proceedings was not available.* Eventually Medberry applied to the federal District Court in Colorado for a writ of habeas corpus under 28 U.S.C. §2254. After hearing, the district court ordered that if Medberry applied for appellate review of his conviction with 30 days, he must be given a transcript of his trial within 8 months; and failing that, he should be given a new trial; otherwise, he would be discharged from State custody. Since the transcript was not available, the effect of the order was to award Medberry a new trial.

The Attorney General of Colorado appealed to the Court of Appeals for the Tenth Circuit. The Court of Appeals stated the issue as follows (290 F. 2d at 276):

> "The issue presented in this habeas corpus proceeding concerns the effect of the due process and equal protection clauses of the 14th Amendment to the United States Constitution when a state refuses to supply an indigent defendant a free transcript of the trial proceedings necessary for an adequate review of a conviction in a murder case."

The Court of Appeals analyzed the *Griffin*, *Eskridge* and *Burns* cases (*Burns* v. *Ohio*, 360 U.S. 252), and concluded (290 F. 2d at 278):

> " . . . While it is unfortunate that at this late date the State of Colorado will be confronted with releas-

* The reported opinions do not disclose precisely why the transcript was unavailable. According to a statement in the appellee's brief filed in the Court of Appeals, the reason was the death of the court reporter. (Brief of Appellee, page 9, Docket No. 6594.)

ing one convicted of murder, or with the difficult but not insurmountable task of retrying him, yet, as said in the *Griffin* case, it is traditional in our system of government that 'constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.'

"The judgment is affirmed and the time for compliance therewith is extended to six months from the date of the issuance of the mandate herein."

This Court denied Colorado's petition for certiorari. (368 U.S. 839, rehearing denied 368 U.S. 922.)

The Westbrook Case

The Court of Appeals for the Seventh Circuit has also held that a convicted pauper in petitioner's position is entitled to a new trial. *U. S. ex rel. Westbrook* v. *Randolph*, 259 F. 2d 215 (7th Cir. 1958). In that case, the official court reporter lost his shorthand notes of Westbrook's 1948 trial, precluding appellate review, despite Westbrook's prompt efforts to obtain a transcript. Unable to obtain review or a new trial in Illinois courts, Westbrook (at all times a pauper) sought and obtained release under the Federal Habeas Corpus Act (28 U.S.C. § 2254). On appeal by the State, the Court of Appeals said (259 F. 2d at 217):

"We have here the unusual situation in which Westbrook has been denied his right of full appeal due to no fault of his own (since he promptly attempted to perfect his appeal), and because of a condition not created by the state and which it is powerless to remedy. We are faced here with the question of whether Westbrook's inability to appeal from a conviction on grounds which only a transcript of the proceedings would reveal, entitles him *ipso facto*, as the district court ruled, to absolute freedom rather than a new trial or some other relief."

The Court of Appeals held that Illinois must grant Westbrook a new, reviewable trial within 6 months, and, failing that, he should be ordered discharged by the federal district court. (259 F.2d at 219.)

The Court of Appeals denied the Illinois Attorney General's petition for rehearing, and he did not seek review in this Court.

These two cases are identical to the case at bar in their salient facts: Circumstances beyond the control of Westbrook, Medberry and Norvell prevented each of them from appealing his conviction. Each of them was and is without fault in failing to obtain appellate review. The difficulty common to them arose solely because the State failed to provide a trial transcript while it was still available.

It was held that Westbrook and Medberry were entitled under the Constitution to new trials. Norvell is entitled to the same relief.

IV.

THE SUPREME COURT OF ILLINOIS HAS RECENTLY AWARDED A NEW TRIAL TO A DEFENDANT WHOSE TRIAL TRANSCRIPT WAS UNAVAILABLE.

THE EQUAL PROTECTION CLAUSE REQUIRES THAT THE SAME RELIEF BE AFFORDED TO PETITIONER.

In its opinion in this case, the Supreme Court of Illinois did not advert to the decision it rendered eight months earlier in *People* v. *Castle* (Illinois Supreme Court Docket No. 35,783, September 22, 1961).*

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* The Court's memorandum order is not published in the Illinois reports; we have lodged with the Clerk of this Court a certified copy of the relevant pleadings and orders in the *Castle* case.

In 1957, Castle was convicted of murder in the Criminal Court of Cook County, Illinois. He applied for and was granted a free transcript under Rule 65-1. However, the Official Court Reporter suffered a stroke and was apparently unable to transcribe her notes, so that Castle could not obtain a trial transcript for review. Based upon this showing, the Illinois Supreme Court ordered that Castle's conviction be reversed, and that he be awarded a new trial.

If a new trial was awarded to Castle, why should not the same relief be afforded to petitioner? And yet petitioner, having been incarcerated under his conviction for over 20 years, has been denied relief, while Castle's conviction was promptly set aside.

Again, in *People* v. *Williams*, Illinois Supreme Court Docket No. 1886,* Williams was convicted in 1953 for taking indecent liberties with a child, and sentenced to imprisonment for from 19 to 20 years. Williams filed a petition under the Illinois Post-Conviction Hearing Act (Ch. 38, §§ 832-836, Ill. Rev. Stat. 1961), contending that fundamental error had occurred at his trial. During the course of the post-conviction hearings, it was discovered that the transcript of Williams' trial was unavailable because of the death of the Official Court Reporter and the illegibility of her notes. The trial judge thereupon awarded Williams a new trial. On appeal by the State of Illinois, the Illinois Supreme Court denied the State's petition for a writ of error to review the trial court's judgment.

Thus, the Supreme Court of Illinois itself has solved this dilemma in favor of the indigent defendant by awarding a new trial where the trial transcript is unavailable. Petitioner should be given the same protection of Illinois law

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* A certified copy of the relevant pleadings and order in the *Williams* case are lodged with the Clerk of this Court.

which was extended to Castle and Williams. But, without any discussion of these two cases, petitioner's request for a new trial was denied by the Illinois Supreme Court. We submit that petitioner has been denied equal protection of Illinois law, in contravention of the 14th Amendment to the federal Constitution.

V.

COURTS UNIFORMLY GRANT NEW TRIALS TO LITIGANTS WHERE, WITHOUT FAULT, THEY CANNOT OBTAIN AN ADEQUATE TRANSCRIPT FOR REVIEW OF THE TRIAL.

Criminal Cases

Granting a new trial when a convicted criminal defendant cannot obtain an adequate record for review is not an innovation in the law. Almost without exception, courts presented with this question have afforded the defendant a re-trial which could be reviewed if a second conviction resulted. In order that the defendant may have the benefit of the full process and protection of the law, the entire procedure is commenced again.

The result reached by the Supreme Court of Illinois in the instant case flies in the face of this entire body of law.

Federal

In *U. S.* v. *Di Canio*, 245 F. 2d 713 (2d Cir., 1957), the court reporter died before transcribing his notes; the transcript was prepared by another reporter.* While concluding that the transcript thus obtained fairly presented what occurred at the trial, the Court of Appeals recognized that a new trial will be awarded "if necessary to the protection of a party's rights." (245 F. 2d at 715.)

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* A certified copy of the relevant pleadings and order in the *Williams* case are lodged with the Clerk of this Court.

New York

This problem has arisen frequently in New York. In *People* v. *DeWilkowska*, 246 App. Div. 285, 285 N.Y.S. 430 (1936), the court reporter died and it was impossible for the defendant to obtain a transcript for appeal. The court pointed out the basic injustice to the unfortunate defendant whose reporter's notes are lost, and awarded a new trial, saying (285 N.Y.S. at 431):

> "The taking of an appeal by a defendant from a judgment of conviction is a matter of right. Where, however, it is impossible to obtain a transcript of the testimony taken upon the trial, the defendant obviously becomes foreclosed from having an appellate court review the evidence or rulings of the trial court. This, in effect amounts to a deprivation of the right to which the defendant is entitled."

In *People* v. *Cittrola*, 210 N.Y.S. 21 (App. Div. 1925), the reporter lost his shorthand notes of the trial, and in granting a new trial the court said (210 N.Y.S. at 22):

> "One convicted of a crime shall not be deprived of his rights to prosecute an appeal because the stenographer cannot produce the minutes of the trial."

Accord: ***People*** v. ***Schwach***, 16 App. Div. 2d 879, 228 N.Y.S. 2d 373 (1962) (court reporter died, new trial awarded to defendant); *People* v. *Willis*, 16 App. Div. 2d 822, 228 N.Y.S. 2d 755 (1962) (stenographic minutes of ***coram nobis*** hearing lost, ***de novo*** hearing ordered); ***People*** v. *Kaplan*, 278 App. Div. 665, 102 N.Y.S. 2d 714 (1951) (minutes of trial permanently unavailable, defendant granted a new trial); *People* v. *Keefe*, 254 App. Div. 683, 3 N.Y.S. 2d 473 (1938) (court reporter died, notes illegible, defendant awarded a new trial); *People* v. *Calloway*, 12 App. Div. 2d 948, 212 N.Y.S. 2d 82 (1961) (transcript of trial unavailable, new trial awarded to defendant).

Wyoming

Likewise in *Richardson* v. *State*, 15 Wyo. 465, 89 Pac. 1027 (1907), the court reporter lost his notes after conviction. In Wyoming, as in Illinois, appellate review of the trial is a statutory right. The Supreme Court of Wyoming awarded the defendant a new trial, saying (89 Pac at 1030):

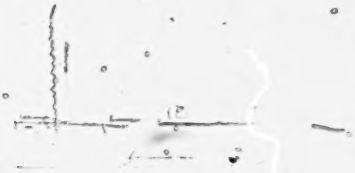
> " . . . The right granted by the statute is to have the final judgment reviewed, and, in case of error, vacated, modified, or annulled, and it is evident that, though a convicted defendant be permitted to file a petition in error, if he be prevented, through no fault of his own, of having made up and filed in this court a proper record necessary for a review of the judgment, he will have been deprived of the right of appeal granted by the statute . . . "

Indiana

Cook v. *State*, 231 Ind. 695, 97 N.E. 2d 625 (1951), involved a man who, like petitioner in the case at bar, was convicted of murder (sentenced to life imprisonment).

After long delay he perfected an appeal, but a question arose as to whether the stenographic transcript could still be obtained. The Supreme Court of Indiana said (97 N.E. 2d at 627):

> "A question of importance remains. It may be that, after this considerable lapse of time, a bill of exceptions containing the evidence cannot be procured, thus making it impossible, through no fault of the defendant, for this court to review the original judgment of conviction. If that situation should develop, a new trial should be granted unless the parties can agree upon a bill of exceptions. [Citing cases.]"



Oklahoma

The Criminal Court of Appeals of Oklahoma reached the same conclusion in *Bailey* v. *U. S.*, 104 Pac. 917, 918 (1909), using language forcefully apposite to petitioner's case:

> "It seems to be well established, as a general rule, that where a defendant has done all that the law requires in perfecting his appeal, and where the record necessary for a review of the case is lost or destroyed while in the custody of an officer of the court, in order to prevent a possible miscarriage of justice by depriving the defendant of his legal right of appeal, a new trial will be granted . . . "

In *Tegler* v. *State*, 3 Okl. Cr. 595, 107 Pac. 949 (1910), the trial judge died before the trial transcript ("case-made") was settled (apparently no court reporter was present at the trial. The transcript filed with the reviewing court was unsatisfactory. The court said (107 Pac. at 950-951):

> ". . . Shall a constitutional privilege conferring a substantial right be denied because some unavoidable accident renders the provisions of law inadequate? . . . It would be a contemptible farce to say that the defendant in this case has been granted the full enjoyment and exercise of his right of an appeal to this court, when, owing to the death of Judge Lowe, it had become out of the power of the defendant to present to this court a case-made as provided by law. . . . We cannot pass intelligently upon the questions presented to this court by the record proper, unless we can consider the facts transpiring at the trial and the testimony of the witnesses. This we cannot do without the case-made. . . .
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> • • •
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> ". . . as there is no case-made in this case, through no fault of the defendant or his counsel, manifest justice requires that the judgment of conviction be reversed, and the cause remanded for a new trial."

Missouri

State v. *McCarver*, 113 Mo. 602, 20 S.W. 1058 (1893), is quite similar to the instant case. There, an indigent defendant was unable to obtain a transcript after his conviction because the court clerk demanded his fees in advance. Eventually, the defendant applied for relief to the Supreme Court of Missouri. A search disclosed that in the interim the stenographic notes of the trial were lost, destroyed, or stolen. The Supreme Court of Missouri awarded a new trial, saying (20 S.W. at 1058-1059):

> ". . . the clerk was required, on the application of the defendant, to make out, certify, and return a full transcript of the record, etc., in the cause, and he had no authority to require the costs of the transcript in advance. His excuse, therefore, in not making out the transcript, which excuse has been hereinbefore quoted, respecting the poverty and inability of the defendant to pay for the much-needed transcript, was not a legal excuse; and the unwarranted delay caused by the refusal of the clerk to do his duty in the premises may have contributed somewhat to the abstraction, loss, or theft of the instrument in question. But, however, that may be, the defendant and his counsel are free from fault: and, having appealed to this court, he had and has a right to be heard in this court, which is 'open to every person,' regardless of their financial standing or inability to pay for the transcripts in their causes. Bill of Rights, § 10. In any ordinary case, we should have great hesitancy in reversing a judgment on account of such a defect in the record as is here presented; but being fully satisfied that the defendant is entirely without negligence or blame in the matter, and has made honest efforts to remedy a defect which, unremedied, would cause our affirmance of the judgment, without giving him an opportunity to be heard on the merits, we feel constrained, in order that right and justice may be done, and a grevious wrong, perhaps, averted, to reverse the judgment, and remand the cause. All concur."

Texas

In *Little* v. *State*, 131 Tex. Crim. 164, 97 S.W. 2d 479 (1936), the court reporter died before transcribing his shorthand notes of the trial. The State and the defendant were unable to agree on a statement of facts. The court ordered a new trial.

In *Bush* v. *State*, 127 Tex. Crim. 547, 78 S.W. 2d 625 (1935), the defendant was unable to obtain a transcript of the trial within the time allowed because he was unable to pay the reporter. He asked the court to mandamus the reporter to prepare the transcript, but, since the time had expired, the court awarded a new trial.

Civil Cases

The same result is uniformly reached in civil cases if, for reasons not ascribable to the losing party, the transcript becomes unavailable, and appeal is therefore impossible.

Federal

This Court stated in *Hume* v. *Bowie*, 148 U.S. 245, 253 (1893):

> ". . . Ordinarily where a party, without *laches* on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted. [Citing cases.]"

In *Guardian Assurance Co.* v. *Quintana*, 227 U.S. 100 (1913), this Court said (227 U.S. at 105):

> ". . . if there was no legal possibility of having the bill of exceptions settled and the right thereto was lost without any fault on the part of the plaintiff in error, the duty would obtain to grant a new trial."

A new trial was granted because the trial judge died without settling the transcript in *Penn Mutual Life Ins. Co.* v. *Ashe*, 145 Fed. 593 (6th Cir. 1906), pursuant to a

federal statute which expressly granted that authority to the successor judge (see 145 Fed. at 595-596).

See also *German Ins. Co.* v. *Town of Manning, Iowa*, 100 Fed. 581 (S.D. Iowa, 1900), reversed on other grounds, 107 Fed. 52 (8th Cir. 1901).

In *Herring* v. *Kennedy-Herring Hardware Co.*, 261 F. 2d 202 (6th Cir. 1958), the court reporter died before preparing the transcript, and the Court of Appeals directed the parties to attempt to reconstruct a record in the trial court. The court also said (261 F. 2d at 204):

> "... If, without fault on the part of the appellant, or because of the failure of the appellee to fully cooperate in the matter, the District Judge is of the opinion that a record cannot be prepared and presented to the Court of Appeals which will fairly and satisfactorily enable the Court to review the judgment entered in this action and that the appellant should be granted a new trial, he will so certify to this Court and the pending motion for a remand will be sustained for action by the District Judge on the motion under consideration by him."

Other jurisdictions

Many cases to this same effect are collected at 13 A.L.R. 102, 107-110; 107 A.L.R. 603, 605, and 19 A.L.R. 2d 1098.

Thus, the relief requested by petitioner is no different from that which courts in this country have historically afforded under the circumstances presented in this case. Since all states in which appeal is a matter of right are now required to provide without charge the means of appeal to pauper-defendants, and presumably are doing so promptly after the trial, the problem presented here is not likely to recur frequently. But in these few cases, in order to prevent what may well be a grave injustice, a new trial should be granted.

VI.

EXPERIENCE UNDER RULE 65-1 DEMONSTRATES THE NEED FOR APPELLATE REVIEW IN ILLINOIS.

In the *Griffin* case, this Court verged on the holding that appellate review is part and parcel of procedural due process in criminal cases. This Court called attention to the fact that "a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . ." (351 U.S. at 18-19.)

Experience in Illinois under Rule 65-1 has substantiated this Court's most dire expectations. Term after term since 1956, the Supreme Court of Illinois has set aside convictions of indigent defendants, many of whom were convicted by prosecutors who were amazingly lax about the rights of paupers, most of whom were convicted in the Criminal Court of Cook County, which, before Griffin, was thought to be the defendant's court of last as well as first resort.

For this Court's information, we have collected in Appendix B (pages 39 to 45) a list of the cases appealed to the Supreme Court of Illinois under Rule 65-1 which have resulted in reversals, including four sentences of 199 years (one of which was imposed in 1936), and nine life sentences. Many of the cases were reversed without remandment.

The large number of unfair trials unearthed through the operation of Rule 65-1 speaks for itself. The wisdom of the *Griffin* holding, and the crying need for appellate review of *all* criminal convictions, has been amply demonstrated, at least in Illinois.

Conclusion

In *Griffin* this Court said: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (351 U.S. at 19.) *A fortiori* there can be no equal justice where a defendant's right to appeal depends on whether the Official Court Reporter is long-lived or uses a legible system of shorthand.

Illinois' unconstitutional conduct—operating against petitioner for 21 imprisoned years—has created this case.

The time has come for the State to grant petitioner his full constitutional rights.

Petitioner should be afforded the full protection intended for all persons accused of crime in Illinois. He too should be given a chance to have an appellate tribunal scrutinize his trial record for prejudicial error. This cannot be done so far as his 1941 trial is concerned. He therefore ought to be granted a new trial which, if it results in a conviction, may be reviewed for error in due course.

Petitioner respectfully requests that the judgment of the Supreme Court of Illinois be reversed, and that this case be remanded with directions to award petitioner a new trial.

THOMAS P. SULLIVAN
ROBERT E. PFAFF
Attorneys for petitioner
Willie Norvell

135 S. LaSalle Street
Chicago 3, Illinois
RAndolph 6-0220

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APPENDIX A

Constitutional Provision, Statute and Rule Involved.

The 14th Amendment.

The Fourteenth Amendment to the Federal Constitution provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Illinois Criminal Code.

At the time of petitioner's trial in 1941, the Illinois Criminal Code provided in Section 771 (Ch. 38, § 771, Ill. Rev. Stat. 1939):

> "Writs of error in all criminal cases, where sentence is not death, shall be considered as writs of right, and issued of course."

This provision is still contained in substance in the Illinois Criminal Code. (Ch. 38, § 769.1, Ill. Rev. Stat. 1961.)

Rule 65-1 of the Rules of the Supreme Court of Illinois.

Rule 65-1(2) of the Rules of the Supreme Court of Illinois (adopted June 19, 1956, amended Sept. 26, 1956) provides (Ch. 110, § 101.65-1, Ill. Rev. Stat. 1961):

> "Any imprisoned person, sentenced prior to April 23, 1956, may file, on or before March 1, 1957, in the court in which he was convicted, a petition requesting that he be furnished with a stenographic transcript of the proceedings at his trial. The petition shall be verified by the petitioner and shall state:
>
> (a) the date of his conviction and the charge upon which he was convicted;

(b) facts showing that he was at the time of his conviction and is at the time of filing the petition without financial means to pay for the cost of a stenographic transcript of the proceedings at his trial;

(c) the alleged errors which petitioner claims occurred at his trial; and

(d) that he desires to apply for issuance of a writ of error to review the conviction.

Notice of the filing of the petition and a copy of the petition shall be served upon the State's Attorney at the time the petition is filed. The State's Attorney may answer the petition within 20 days after service of the petition on him and shall transmit a copy of his answer, if any, to the petitioner. If upon consideration of the petition and answer, the court finds:

(a) that the petitioner was at the time of his conviction and is at the time of filing the petition without financial means to pay for the cost of a stenographic transcript of the proceedings at his trial, and

(b) that a stenographic transcript of the proceedings at his trial, (or any appropriate portion thereof), is necessary to present fully the errors recited in the petition,

the court shall direct the court reporter to transcribe an original and copy of his notes, in whole or in part, as is appropriate to present fully the errors set forth in the petition, without charge to the defendant. If satisfied as to the accuracy of the transcript, the court shall, irrespective of the provisions of Rule 65 fixing the time for the presentation, certification and filing of reports of proceedings at trials, certify to its correctness. The original of the certified transcript shall be filed with the clerk and the copy transmitted to the petitioner. In the event the court finds that it is impossible to furnish petitioner a stenographic tran-

script of the proceedings at his trial because of the unavailability of the court reporter who reported the proceedings and the inability of any other court reporter to transcribe the notes of the court reporter who served at the trial, or for any other reason, the court shall deny the petition.

"Thereafter, the petitioner may file in this court or in the Appellate Court, whichever is appropriate, an application for a writ of error to review his conviction. The application shall be verified by petitioner and entitled 'Petition for Writ of Error Under Rule 65-1.' It shall state (1) the crime charged against petitioner, the verdict, if any, of the jury, the judgment and sentence; and (2) a concise statement of all errors, whether or not stated in the petition for the transcript of the trial proceedings, which petitioner claims occurred at his trial. Copies of the application shall be served as provided for service of petitions under Rule 27, and proof of service shall be filed. The copy served upon the clerk of the trial court shall be accompanied by a *praecipe* designating the portions of the record of the trial court petitioner desires to have incorporated in the record to be reviewed. The clerk of the trial court shall, within 30 days after receipt of the application and *praecipe* and without cost to petitioner, prepare, certify and forward to the clerk of this court or of the Appellate Court, whichever is appropriate, a copy of the record as requested in the *praecipe*, always including, however, the indictment, information or complaint, the arraignment, plea, and the stenographic proceedings, if any, in respect thereto, the verdict of the jury, if any, the judgment and sentence, and the original of the transcript of the proceedings at the trial.

"The State's Attorney shall file an answer to the petition within 30 days after the copy of the record is required to be transmitted by the clerk of the trial court.

"Except as is otherwise provided in this rule, Rule 27 applies to and governs all proceedings, practice and procedure in this court and the Appellate Court as to applications for and writs of error granted under this rule.

"If upon examination of the petition, answer and record it does not appear there is reasonable ground to believe that prejudicial error occurred in the proceedings that resulted in petitioner's incarceration, the application for writ of error shall be denied."

APPENDIX B

Below are listed cases in which, according to information available to petitioner's counsel, appeals perfected under the provisions of Illinois Supreme Court Rule 65-1 (adopted in 1956) have resulted in reversals or reversals and remandment for further proceedings.

This list does not include cases appealed to the Supreme Court of Illinois by paupers from a death sentence which resulted in reversal, because Illinois has for many years made free transcripts available in such cases (Ch. 38, § 769a, Ill. Rev. Stat. 1961). See, e.g., *People* v. *Crump*, 5 Ill. 2d 251, 125 N.E. 2d 615 (1955); *People* v. *Jackson*, 9 Ill. 2d 484 (1956); *People* v. *Nemke*, 23 Ill. 2d 591, 179 N.E. 2d 825 (1962); *People* v. *Adams*, 25 Ill. 2d 568 (1962).

This list does not include cases appealed to the Supreme Court of Illinois under the Illinois Post-Conviction Hearing Act (Ch. 38, §§ 826-832, Ill. Rev. Stat. 1961) which have resulted in reversal and remandment for a new trial. See, for example, *People* v. *Williams*, No. 1886, referred to in this brief at page 25; *People* v. *Cox*, 12 Ill. 2d 265, 146 N. E. 2d 19 (1957) (the defendant convicted of murder in 1950, sentenced to 14 years imprisonment).

Nor does the list include cases in which this Court has set aside Illinois convictions on federal constitutional grounds. See, e.g., *Reck* v. *Pate*, 367 U.S. 433 (1961), reversing 274 F.2d 250 (7th Cir. 1960) (defendant convicted of murder in 1936, sentenced to imprisonment for 199 years); *Napue* v. *Illinois*, 360 U.S. 264 (1959), reversing 13 Ill. 2d 566 (1958) (defendant convicted of murder in 1940, sentenced to imprisonment for 199 years). Also excluded are cases in which lower federal courts have set aside Illinois convictions of paupers. See, e.g., *U. S. ex rel. Westbrook* v. *Randolph*, 259 F.2d 215 (7th Cir. 1958) (de-

fendant convicted of armed robbery in 1948, sentenced to imprisonment for 30 to 50 years) referred to above at page 23.

This list does not include cases in which the Supreme Court of Illinois reversed or reversed and remanded in a memorandum order not published in the official reports. See, for example, *People* v. *Clyde Castle*, Docket No. 35783, referred to in this brief at page 24.

Also not included are cases in which a County Public Defender has challenged an indigent defendant's sentence or incarceration by collateral means. See, for example, *People ex rel. Johnson* v. *Pate*, 23 Ill. 2d 409, 178 N.E. 2d 398 (1961) (original petition for habeas corpus; defendant having served sentence of 5 to 15 years less good time allowance, ordered discharged from custody).

Nor have we included paupers' cases which were remanded in order to correct an improper sentence. See, for example, *People* v. *Carr*, 23 Ill. 2d 103, 177 N.E. 2d 361 (1961) (sentence to the Illinois penitentiary for from 1 to 7 years set aside, remanded with directions to sentence defendant to the Illinois Youth Commission); *People* v. *Motis*, 23 Ill. 2d 556, 179 N.E. 2d 637 (1962) (sentence of 5 to 10 years held improper); *People* v. *Naujokas*, 25 Ill. 2d 32 (1962) (life sentence held improper); *People* v. *Moriarity*, 25 Ill. 2d 565, 185 N.E. 2d 688 (1962) (sentence of 10 years to life set aside).

There may well be omitted from this list cases brought to the Supreme Court of Illinois under Rule 65-1 where it does not appear from the official report or from information available to petitioner's counsel that the case was a pauper's case. However, petitioner's counsel believe that this list includes almost all of the cases appealed under Rule 65-1 which have resulted in reversal or reversal and remandment:

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Coulson	13 Ill. 2d 290, 149 N.E. 2d 96	Armed robbery	1955	5-10 years	Reversed	1958
Schlenger	13 Ill. 2d 63, 147 N.E. 2d 316	Grand larceny	1952	5-10 years	Reversed	1958
Hinton	14 Ill. 2d 424, 152 N.E. 2d 830	Indecent liberties and contributing	1955	5-10 years	Reversed and remanded	1958
Munroe	15 Ill. 2d 91, 154 N.E. 2d 225	Murder	1936	199 years	Reversed and remanded	1958
Sammons	17 Ill. 2d 316, 161 N.E. 2d 322	Murder			Reversed and remanded	1959
Tunstall	17 Ill. 2d 160, 161 N.E. 2d 300	Armed robbery		1-10 years	Reversed and remanded	1959
Nelson	18 Ill. 2d 313 164 N.E. 2d 16	Armed robbery	1957	20-35 years	Reversed and remanded	1960
Dirkans	18 Ill. 2d 300, 164 N.E. 2d 23	Armed robbery	1958		Reversed	1960
McKinzie	18 Ill. 2d 44, 163 N.E. 2d 1	Rape	1956	Life	Reversed and remanded	1959

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
O'Connell	20 Ill. 2d 442, 170 N.E. 2d 533	Armed robbery	1956	10-25 years	Reversed and remanded	1960
Morgan	20 Ill. 2d 437, 170 N.E. 2d 529	Larceny		5-10 years	Reversed and remanded	1960
Bender	20 Ill. 2d 45, 169 N.E. 2d 328	Armed robbery		Life	Reversed and remanded	1960
Strong	21 Ill. 2d 320, 172 N.E. 2d 765	Sale and possession of narcotics	1959	25 to Life	Reversed	1961
Gregory	22 Ill. 2d 601, 177 N.E. 2d 120	Murder		199 years	Reversed and remanded	1961
Birdette	22 Ill. 2d 577, 177 N.E. 2d 170	Armed robbery			Reversed and remanded	1961
Soznowski	22 Ill. 2d 540, 177 N.E. 2d 146	Burglary	1956	5 to 10 years	Reversed	1961
Williams	23 Ill. 2d 295, 178 N.E. 2d 372	Rape and robbery	1957	3-15 years	Reversed	1961
Harris	23 Ill. 2d 270, 178 N.E. 2d 291	Burglary	1958	Life	Reversed and remanded	1961

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Jackson	23 Ill. 2d 263, 178 N.E. 2d 310	Murder		199 years	Reversed and remanded	1961
Stewart	23 Ill. 2d 161, 177 N.E. 2d 237	Burglary and larceny	1955	Life	Reversed and remanded	1961
Johnson	23 Ill. 2d 465 178 N.E. 2d 878	Rape	1959	15 years	Reversed and remanded	1961
Wright	24 Ill. 2d 88 180 N.E. 2d 689	Rape and burglary	1957	10-20 and Life	Reversed and remanded	1962
Wyatt	24 Ill. 2d 151 180 N.E. 2d 478	Robbery	1959	1-8 years	Reversed and remanded	1962
Williams	24 Ill. 2d 214 181 N.E. 2d 353	Larceny			Reversed	1962
Lott	24 Ill. 2d 188 181 N.E. 2d 112	Sale and dispensing of narcotics		10 years	Reversed	1962
Shaw	24 Ill. 2d 219 181 N.E. 2d 120	Crime against nature	1958	2-7 years	Reversed	1962
Donaldson	24 Ill. 2d 315 181 N.E. 2d 131	Murder		Life	Reversed and remanded	1962
Jefferson	24 Ill. 2d 398 182 N.E. 2d 1	Armed robbery			Reversed	1962
King	24 Ill. 2d 409 182 N.E. 2d 194	Rape		199 years	Reversed and remanded	1962

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Mosley and Smith	24 Ill. 2d 565 182 N.E. 2d 658	Robbery	1961	5-8 years	Reversed and remanded	1962
Parren	24 Ill. 2d 572 182 N.E. 2d 662	Possession of narcotics	1959	4-7 years	Reversed	1962
Battle	24 Ill. 2d 592 182 N.E. 2d 713	Murder			Reversed and remanded	1962
Brown	24 Ill. 2d 603 182 N.E. 2d 710	Murder	1960	20 years	Reversed	1962
Roebuck	25 Ill. 2d 108 183 N.E. 2d 166	Possession of narcotics	1960	5-10 years	Reversed	1962
Nelson	25 Ill. 2d 38 ..... N.E. 2d	Armed robbery	1960	5 to Life	Reversed	1962
Crocker	25 Ill. 2d 52 183 N.E. 2d 161	Rape		25 years	Reversed and remanded	1962
Taylor	25 Ill. 2d 79 ..... N.E. 2d	Burglary	1960	5-8 years	Reversed	1962
Nimmer	25 Ill. 2d 319 185 N.E. 2d 249	Robbery		5-8 years	Reversed and remanded	1962
Kolden	25 Ill. 2d 327 185 N.E. 2d 170	Indecent liberties		1-20 years	Reversed	1962
Fuller	25 Ill. 2d 384 185 N.E. 2d 223	Armed robbery		8-10 years	Reversed	1962

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Lewis	25 Ill. 2d 396 185 N.E. 2d 668	Sale of narcotics			Reversed and remanded	1962
Mosby	25 Ill. 2d 400 185 N.E. 2d 152	Burglary	1960	5-10, 15-30 consecutively	Reversed and remanded	1962
Harrison	25 Ill. 2d 407 185 N.E. 2d 244	Rape, crime against nature	1960	10 years	Reversed as to two counts	1962
Smith	25 Ill. 2d 428 185 N.E. 2d 250	Burglary			Reversed and remanded	1962
Banks	Docket #35758	Rape	1956	Life	Reversed and remanded	1962
McGlothen	Docket #36425	Murder	1959	14-20 years	Reversed and remanded	1962
Dupree	Docket #36453	Armed robbery	1960	10-20 years	Reversed and remanded	1962
Canada	Docket #36474	Murder	1961	Life	Reversed and remanded	1962
Moore	Docket #36669	Sale of narcotics	1961	10-11 years	Reversed and remanded	1962
Polenisiak	Docket #37149	Possession of burglar tools	1960	1-2 years	Reversed	1962

Defendant's name	Citations	Crime	Year of sentence	Sentence	Result	Year of reversal
Pitts	Docket #36975	Possession of narcotics	1961	5-10 years	Reversed	1962
White	Docket #36898	Rape	1960	10 years	Reversed	1962
Givens	Docket #37161	Murder	1962	14-20 years	Reversed	1962
Friason	22 Ill. 2d 563 177 N.E. 2d 230	Burglary	1959	10-20 years	Reversed	1961
Robinson	23 Ill. 2d 27 177 N.E. 2d 132	Burglary and receiving stolen property		5-10 years	Reversed	1961
Crawford	23 Ill. 2d 605 179 N.E. 2d 667	Burglary	1960	2-20 years	Reversed and remanded	1962
Kuczynski	23 Ill. 2d 320 178 N.E. 2d 294	Armed robbery		Life	Reversed and remanded	1961
Bullocks	23 Ill. 2d 515 179 N.E. 2d 628	Larceny		3-10 years	Reversed and remanded	1962
Williams	23 Ill. 2d 540 179 N.E. 2d 839	Possession of narcotics		2-5 years	Reversed	1962
Sullivan	23 Ill. 2d 582 179 N.E. 2d 634	Sale of narcotics		5-15 years	Reversed	1962
Williams	25 Ill. 2d 562 185 N.E. 2d 686	Possession of narcotics		2-3 years	Reversed	1962

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Supreme Court of the United States

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Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

RESPONDENT'S BRIEF.

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago (1), Illinois, (FI 6-2000),
Attorney for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
EDWARD A. BERMAN,
Assistant Attorneys General,
Of Counsel.

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STATUTES AND AUTHORITIES CITED.

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RESPONDENT'S ADDITIONAL STATEMENT OF THE CASE.

Petitioner's Statement of the Case (*Petitioner's Brief on the Merits*, pp. 3-9) is fair, accurate and complete in its factual substance.

But because that statement, although candid, is skillfully written in a tenor that favors petitioner, we thus distill the essence of the facts, carefully noting the respects in

which the facts in this case resemble and observing the features that differentiate this case from the decisions principally relied upon by petitioner, *Griffin* v. *Illinois*, 351 U. S. 12, (1956), *Eskridge* v. *Washington State Board*, 357 U. S. 214, (1958) and *United States ex rel. Westbrook* v. *Randolph*, 259 F. 2d 215 (7th Cir., 1958):

In September, 1941, petitioner, then 18 years old, was convicted (with two other defendants) upon a charge of murder, plea of not guilty and a bench trial, intervention of a jury having been waived. He was represented on the trial by counsel of his family's choice. He was sentenced to the Illinois Penitentiary for a term of 199 years.

In the language of petitioner's counsel in this court (*Petitioner's Brief*, p. 3) "At the time of his conviction, petitioner made inquiries of the Official Reporters with respect to the method and cost of obtaining the transcript of the trial, and, on his motion, the trial court extended the time for presentation and certification of the transcript for 90 days. (Tr. 2.)"

As petitioner's brief correctly notes, "A rule of the Illinois Supreme Court required that the transcript be certified by the trial judge and filed within 50 (later changed to 100) days after judgment. (Ch. 110, § 259.70A, Ill. Rev. Stat. 1939.)" (*Petitioner's Brief*, p. 3.)

Thus the instant case resembles *Griffin*, (351 U. S. 12 (1956)) in that both petitioner in this case, a pauper, and the two petitioners, both paupers, in *Griffin* made timely requests for bills of exceptions or stenographic transcripts of the proceedings at their trial *gratis*.

But this case differs signally from *Griffin* in that, although Griffin and his co-petitioner specifically made *prompt and timely* invocation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and pursued

that *timely* request to this court, petitioner never suggested any claim of a Federal constitutional right to a free transcript until November 19, 1956, shortly (7 months and 5 days) after this Court announced its decision in *Griffin but more than 15 years* after the date of his conviction and sentence and long after the death of the official Court Reporter E. H. Allen, who had inscribed in shorthand most of the proceedings at petitioner's trial, including the evidence of petitioner's confession and other evidence upon which petitioner was convicted.

The instant case is likewise similar to *Eskridge*, 357 U. S. 214, in that petitioner in the instant case and Eskridge, both paupers, requested free transcripts of the evidence upon which they were convicted. But this case distinguishes itself from *Eskridge* in that Eskridge, in this Court's language (emphasis ours) (357 U. S. 214, at p. 215), "gave *timely* notice of appeal to the Supreme Court of the State" and made prompt and *timely* application to the Supreme Court of Washington "for writ of mandate ordering the trial judge to have a transcript furnished for the prosecution of [Eskridge's] appeal" to that court.

The Supreme Court of Washington "denied this petition and simultaneously granted the State's motion to dismiss petitioner's appeal for failure to file a certified 'statement of facts' and 'transcript of record.'"

Thus Eskridge, unlike the instant petitioner, exhausted his State remedies before they were barred by lapse of time.

And the instant case differs from *Westbrook*, 259 F. 2d 215, in that Westbrook "filed a *timely* notice of appeal, asking for and receiving several extensions of time, aggregating about eight months in which to file his bill of exceptions." (259 F. 2d 215, at p. 216.)

THE QUESTION PRESENTED.

The question presented is:

PETITIONER, CONVICTED OF MURDER IN 1941, A PAUPER, DID MAKE AN INFORMAL REQUEST FOR A FREE REPORT OF PROCEEDINGS BUT DID NOT THEN INVOKE ANY CLAIM OF CONSTITUTIONAL RIGHT OR PURSUE THAT REQUEST. MORE THAN 15 YEARS AFTER HIS CONVICTION, LONG AFTER THE REPORTER'S DEATH HAD RENDERED THAT TRANSCRIPT UNAVAILABLE AND HAD MADE IMPOSSIBLE THE CONSTRUCTION OF A "BYSTANDER'S BILL OF EXCEPTIONS" PETITIONER INVOKED THE *GRIFFIN* CASE (351 U. S. 12, (1956)). THE SUPREME COURT OF ILLINOIS HELD THAT PETITIONER'S CLAIM TO A BILL OF EXCEPTIONS WAS THEN BARRED. DOES THIS HOLDING DENY PETITIONER DUE PROCESS OR EQUAL PROTECTION OF LAW?

ARGUMENT.

I.

Petitioner has not been denied due process or equal protection of the law.

The instant case presents a question that this court has never thus far considered, at least in any written opinion.[1]

That question, thus precisely delineated is:

> AN INDIGENT PRISONER CONVICTED MANY YEARS BEFORE THIS COURT'S DECISION IN *GRIFFIN*, DID MAKE SOME "REQUEST" OR OTHER EFFORT, FORMAL OR INFORMAL, TO OBTAIN A FREE TRANSCRIPT OF THE EVIDENCE UPON WHICH HE WAS CONVICTED AT THE TIME THAT HE WAS CONVICTED. BUT HE DOES NOT INVOKE THE FEDERAL CONSTITUTION EVEN IN THE TRIAL COURT, MUCH LESS DOES HE EXHAUST ANY AVAILABLE REMEDIES IN THE COURTS OF HIS STATE OR SEEK TO REPAIR TO THIS COURT, UNTIL YEARS AFTER HIS CONVICTION AND YEARS AFTER THE COURT REPORTER HAS DIED OR BECOME TOTALLY INCAPACITATED. IT HAS BECOME IMPOSSIBLE EITHER TO TRANSCRIBE THE STENOGRAPHER'S SHORTHAND OR TO RECONSTRUCT THE FAIR SUBSTANCE OF THE PROCEEDINGS AT THE PETITIONER'S TRIAL. DOES DUE PROCESS OR EQUAL PROTECTION REQUIRE THAT SUCH A PRISONER AND EVERY OTHER SUCH PRISONER BE RETRIED OR SET AT LIBERTY?

It is to this question that this brief is addressed.

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[1] Of course, we make no mention of the cases in which this question might have been presented but in which this court denied *certiorari* without opinion.

We realize that such dismissals of *certiorari* import nothing and note their possible presence only to indicate that we ignore them because they are meaningless and not because the Attorney General is not aware of them.

The principal and we think the only question fairly and really presented by this writ of *certiorari* is *not* whether *Griffin* is "retroactive" in some vague and misleading sense of that word which would restate the question as "Must every indigent State prisoner who was convicted before *Griffin* now be retried or set free if in the years intervening between his conviction and his invocation of *Griffin* the court reporter has died or become incapacitated or his notes have been lost and it is impossible to reconstruct a bystander's bill of exceptions?"

The question is whether a State denies due process or equal protection when that State's court holds that a prisoner who has thus delayed for many years any invocation of *Griffin* until after the reporter's death has not made timely exhaustion of his available and adequate State remedies and therefore no longer has if he ever had a right to be set free unless he can again be tried and convicted?

Petitioner and the hundreds or thousands of other State prisoners like him cannot extricate themselves from the following dilemma:

If as the opinion of the Supreme Court of Illinois would suggest, *Griffin* was not intended to apply to persons convicted before the date of the announcement of the opinion in that case, then *Griffin* does not apply to petitioner. But if *Griffin* is "retroactive" in the sense that it did no more than declare what was always the law, then it was the law in 1941 and if Illinois' highest courts would not have recognized that law in that year, this court would have done so upon *certiorari* or upon a direct appeal challenging as unconstitutional Illinois' statutes insofar as they discriminated against indigent prisoners in the matter of transcripts.

This dilemma is not a piece of dialectical metaphysics. It is grounded in the *supremely practical* considerations that underlie the exposition and enforcement of criminal jurisprudence and constitutional law.

Prisoners either must or they need not make timely claim of Federal constitutional rights. The mere fact that a State court may not respect those rights is no reason for not invoking them "as long as this court sits"; for otherwise there would be no basis for the doctrine of "exhaustion of State remedies" and there would be no such doctrine.

A leading and pertinent pronouncement of this court is

Darr v. Burford, 339 U. S. 201.

In the *Darr* case, the court thus stated the exigent question:

> "Petitioner Darr, an inmate of the Oklahoma state penitentiary, has been denied federal habeas corpus for failure to exhaust his other available remedies. Petitioner's omission to apply here for certiorari from the state court's denial of habeas corpus was held an error, fatal to consideration on the merits. Therefore the merits of petitioner's claims of imprisonment in violation of the Constitution are not before us. The petition for certiorari requires us to pass solely upon the correctness of the lower court's view that ordinarily a petition for certiorari must be made to this Court from a state court's refusal of collateral relief before a federal district court will consider an application for habeas corpus on its merits." [Darr contended, *inter alia*, that a plea of guilty had been extorted from him by unconstitutional coercion.]

This court said at page 217:

> "* * * It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration."

To be sure *Darr* reached this court through Federal appellate hierarchy from a denial by a United States District Court of a writ of *habeas corpus*, that denial being grounded solely upon failure to exhaust State remedies, whereas the instant case is here upon *certiorari* directed directly to the State's highest court.

But Illinois' highest court denied relief in this case, not upon the ground that petitioner would not have been entitled to a free transcript had he made *timely* claim of a Federal constitutional right to that transcript as did Griffin, Eskridge and Westbrook, but upon the ground that, no such application having been made, petitioner's conviction has become final.

Another important and pertinent utterance by this court occurs in

Brown v. Allen, 344 U. S. 443.

In *Brown*, "the records raised serious federal constitutional questions upon which the carrying out of death sentences depended and procedural issues of importance in the relations between states and the Federal Government upon

which there was disagreement in this Court." (344 U. S. 446, at p. 447.)

In *Brown*, this court respected the right of a State to refuse appellate review, even in a case where the death sentence was imposed and the defendants were represented by counsel appointed by the court, not by counsel of their own choice, where those counsel failed to file a timely notice of appeal and there was no suggestion of covin or collusion with state officials.

The court said at pp. 484-5:

> "The failure to perfect the appeal came in this way. Upon the coming in of the verdict on June 6, 1949, the petitioners several times moved for a new trial, in each motion reiterating one or the other of the aforementioned federal questions. These motions were denied, and the trial court pronounced its sentence. Petitioners excepted to the judgments and noted appeals therefrom to the State Supreme Court. In response to petitioners' notice, the trial judge granted petitioners 60 days in which to make and serve a statement of the case on appeal. When counsel failed to serve this statement until 61 days had expired, the trial judge struck the appeal as out of time. This action precluded an appeal as of right to the State Supreme Court."

After discussion of the scope of Federal *habeas corpus*, the court returning to its consideration of North Carolina's dismissal of the appeal, said at page 486:

> "North Carolina has applied its law in refusing this out-of-time review. This Court applies its jurisdictional statute in the same manner. *Preston* v. *Texas*, 343 U. S. 917, 933; cf. *Paonessa* v. *New York*, 344 U. S. 860, *certiorari* denied because 'application therefor was not made within the time provided by law.' We cannot say that North Carolina's action in refusing review,

> after failure to perfect the case on appeal violates the Federal Constitution. *A period of limitation accords with out conception of proper procedure.*" (Emphasis supplied.)

The decision of the Supreme Court of Illinois does *not* rest on any view that *Griffin* was "prospective only" and not "retroactive"; for the Supreme Court of Illinois said in its opinion in this case (*Appendix*, p. 3):

> "We had, of course, already removed financial barriers which prevented indigent defendants sentenced prior to the *Griffin* case from now securing free transcripts if it is possible to obtain them. Ill. Rev. Stat. 1957, chap. 110, par. 101.65-1 (2)."

Hence, since Illinois had "*already* removed financial barriers which prevented indigent defendants sentenced prior to the *Griffin* case," no question of the "prospective" or "retroactive" effect of *Griffin* was decided by, involved in or pertinent to this case.

It is clear from a reading of the opinion of the Supreme Court of Illinois in the instant case that what that court held and all that it held was that an indigent prisoner who waits many years after his conviction and until long after the death of the court reporter who inscribed these shorthand notes of his trial is not entitled to freedom if the State cannot convict him upon a trial *de novo*.

This holding, we submit does not present a substantial Federal constitutional question. But if the question be deemed substantial, it should be resolved in affirmance of the judgment of the Supreme Court of Illinois in this case.

Conclusion.

For the reasons suggested in this brief, it is respectfully submitted either that, upon plenary consideration, the writ of *certiorari* should be dismissed as improvidently granted, no substantial Federal question appearing, or that if the only question involved is deemed substantial, that question should be decided in favor of Illinois.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
Suite 900, 160 N. La Salle St.,
Chicago 1, Illinois (FInancial 6-2000).
Attorney for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
EDWARD A. BERMAN,
Assistant Attorneys General,
Of Counsel.

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PETITIONER'S REPLY BRIEF

THOMAS P. SULLIVAN
ROBERT E. PFAFF
135 S. LaSalle Street
Chicago 3, Illinois
Attorneys for Petitioner,
Willie Norvell

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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PETITIONER'S REPLY BRIEF

(1)

Foreword

The chief significance of the State's brief lies in its omissions. No attempt is made to come to grips with petitioner's theory or argument. Rather, by a kind of confession and avoidance, and for the first time in this case, the State argues the doctrine of waiver, coupled with the

subtle suggestion that petitioner should not be granted a new trial because Illinois may have difficulty in proving a case against him at this time.

The State has not even attempted to defend the reasoning advanced by the Illinois Supreme Court in denying relief to petitioner. Instead, the ground of the decision below is misstated to comport with the waiver theory introduced for the first time in this Court.

The State's brief is likewise significant for its lack of reference to the opinion of the Supreme Court of Illinois on remand in the *Griffin* case, in which it was expressly held that the doctrine of waiver would not be applied to persons in petitioner's situation.

The State has ignored petitioner's citation of the many cases in which courts throughout this country (including the court below) have awarded new trials where no adequate record is available for appeal (Petitioner's Brief, pp. 26 to 33).

We shall address each of the State's contentions, seriatim, as they appear in the State's brief.

(2)

Petitioner has not waived or failed to exhaust his right to appellate review of his trial.

The State's primary contention is that because petitioner failed to apply for a transcript for appeal immediately upon his conviction in 1941, and to contend at that time that the State's failure to provide him with a gratis transcript violated his constitutional rights, he has waived or failed to exhaust his right to appellate review, and he is now precluded from asserting that right. The State says

(Brief pp. 6-7) that if petitioner had made this contention in 1941, his position ultimately would have been sustained by this Court, presumably while the reporter still lived, hence the present problem would have been avoided.

We have several comments upon this argument:

First. This contention is asserted for the first time in this Court. It was not made below. We ask the Court to scan the brief filed below by the State, which is included in the Record on Appeal here.

Second. Under Illinois law when petitioner was convicted in 1941, he had 50 (later changed to 100) days from the date of judgment within which to obtain the trial transcript and have it certified. (Ch. 110, § 259.70A, Ill. Rev. Stat. 1939.) Thereafter, he had 20 years within which to file a praecipe for writ of error in the Supreme Court of Illinois and thus obtain, as of right, a complete direct review of the trial by writ of error. (Ch. 38, § 771, Ill. Rev. Stat. 1939; *People* v. *Murphy*, 296 Ill. 532, 533 (1921); *People* v. *Munroe*, 15 Ill. 2d 91, 94 (1958).)*

Third. Immediately after his trial, petitioner, who was then indigent and no longer represented by counsel, made inquiries of the court reporters as to how to obtain the transcript, and what it would cost. He applied for and received an extension of 90 days for certification of the transcript. (Tr. 2.) However, because he was a pauper, petitioner was unable to procure the transcript, and the time for certification expired. (Tr. 36-37, 42, 49-50.)

Petitioner remained in prison. Mr. Allen, the reporter at petitioner's trial, died in 1949. (Tr. 6.)

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* Reduced to 3 years in 1961. (Ch. 38, § 769.1, Ill. Rev. Stat. 1961.)

Fourth. In 1956, on remand from this Court's decision in the *Griffin* case, the Illinois Supreme Court carefully examined the question whether the State was required to supply transcripts to persons (such as petitioner) convicted before April 23, 1956 (the date of the *Griffin* decision by this Court) who were indigent at the time of their convictions but who did not then ask for a transcript or contend that their constitutional rights were violated because the State failed to provide a free transcript. The court considered whether to adopt the rule that indigent persons convicted before *Griffin* who failed to contend immediately after their convictions that they had a constitutional right to a free transcript, had waived the right to a transcript. On that subject the court said (9 Ill. 2d at 167):

> "We have considered the applicability of doctrines of waiver. Our rules require that reports of proceedings at the trial be presented to the trial judge for approval within 100 days from the entry of the judgment, or within an extended period fixed by the trial judge. It could be held that a prisoner who did not request a free transcript within the time so fixed has waived his right. But waiver assumes knowledge, and we are unwilling to hold, under the circumstances of this case, that the constitutional rights of prisoners have been waived."

The brief filed in this Court by the Attorney General of Illinois gives the impression he is unaware that, seven years ago, the Supreme Court of Illinois rejected the waiver argument he belatedly seeks to advance in this case. This holding vitiates the "dilemma" which the State says is confronting petitioner (State's brief, p. 6), because the Illinois Supreme Court has expressly held that *Griffin* applies retrospectively in Illinois, and failure to argue the *Griffin* principle at the time of conviction is not a waiver of the right of current review.

Fifth. To comply with this Court's opinion in *Griffin*, as applied on remand as stated above, the Supreme Court of Illinois promulgated Rule 65-1 providing that the State shall pay for transcripts for indigent convicted defendants. Subsection (2) of that rule [Appendix A to Petitioner's Brief, pp. 35-38], dealing with persons convicted before April 23, 1956, dispenses with the time period for certification of the transcript if the defendant files a verified petition in the form prescribed on or before March 1, 1957. The rule does *not* require that the defendant have contended at the time of his conviction that failure to provide a free transcript violated his constitutional rights. This rule provides that if the stenographic notes cannot be transcribed "the court shall deny the petition" for a free transcript; the rule is silent as to whether, in this situation, the court should thereafter grant other relief to the petitioner.

Sixth. Pettiioner filed a timely petition under Rule 65-1(2), and an order was entered by the trial court directing that the transcript be prepared at State expense. (Tr. 2-3.) When it was discovered that the complete transcript could not be compiled, petitioner filed a motion for new trial, the denial of which is now before this Court.

Seventh. Illinois, having taken giant steps toward making appellate review available to all indigent defendants, whenever convicted, should not and under the 14th Amendment may not deny relief to those few defendants who had Official Court Reporters who wrote illegible shorthand and who died before *Griffin* was announced and complied with by the errant states. Whether the Official Court Reporter was healthy, or a careful writer, should not determine whether or not a convicted person is afforded appellate review. This distinction is more capricious than one based

on the defendant's wealth. It would violate the Equal Protection clause to hold that a convicted pauper has waived or lost his right to appellate review of his trial, or to alternative relief, *if but only if* it subsequently appears that the Official Reporter has died and his notes cannot be transcribed. The State may not rule the very same conduct to have prejudicial effect in some cases and not in others where the distinction depends upon the happening of subsequent events (*viz.*, the reporter's death and the inability to read his notes) induced by the State's own misconduct and over which the defendant has no control.

Eighth. This Court and the court below have recognized that the duty was on the State of Illinois, in 1941 as in 1956, to provide a transcript to petitioner without cost so that he could obtain appellate review of his conviction. The fault rests upon the State for not making appellate review available to petitioner in the eight years after the trial while Mr. Allen lived, and not with petitioner for failing to raise a federal constitutional issue at the time of his trial. This Court should not place upon a mentally defective, imprisoned indigent the obligation of presenting the *Griffin* issue in 1941. Most of the many defendants who have already secured free transcripts and full review of their trials did not do so; there is no sound reason why this requirement should be imposed on petitioner.

Ninth. Petitioner has not waived any of his rights. In *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), it is said:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' [citing case] of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights' [citing case]. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

This is the salutary principle which impelled the Illinois Supreme Court to reject the waiver argument on remand in the *Griffin* case.

Tenth. Rule 65-1(2) of the Rules of the Supreme Court of Illinois was designed to put indigents convicted before Griffin in the position they would have been in if, at the time of their convictions, free transcripts had been available to them. Under these circumstances, basic principles of justice, overwhelming precedent, and the federal Constitution, require that a new trial be granted to a convicted defendant who, through no fault of his own, cannot obtain a transcript. This is the only fair way of solving the unfortunate dilemma presented here.

The State of Illinois should now be required to do for petitioner that which it would do for him if this situation arose in a current case, just as Clyde Castle was granted a new trial by the Supreme Court of Illinois in September, 1961 because he was unable to get a transcript of his 1957 trial (see Petitioner's Brief pp. 24-25.)

(3)

Respondent's authorities distinguished.

The State places its principal reliance upon two cases dealing with failure to exhaust state remedies as a prerequisite to use of federal habeas corpus. Those cases are inapposite since this case comes here on direct review from the Illinois Supreme Court, petitioner having exhausted all available Illinois remedies.

Darr v. Burford

Darr v. *Burford*, 339 U.S. 200 (1950) (State's Brief pp. 7-8) was an habeas corpus proceeding commenced in a federal court to obtain relief from a judgment of conviction

entered by a state court. Darr had not filed a petition for certiorari to this Court from the refusal of the state court to grant collateral relief. The only issue presented to and decided by this Court was whether Darr's failure to seek certiorari precluded recourse to the federal court.

In contrast, this case is here on certiorari directly from the Illinois Supreme Court, which affirmed denial of petitioner's motion for new trial.

Brown v. *Allen*

Brown v. *Allen*, 344 U.S. 443 (1953) (State's Brief pp. 8-10), also involving federal habeas corpus to attack a state court judgment, holds (*inter alia*) that states may enforce a reasonable jurisdictional time limit for appeal. This rule is inapplicable at bar because, in *Griffin*, Illinois' system of criminal appeals was found constitutionally inadequate as applied to paupers; after *Griffin*, Illinois relaxed its time limitations for certification of transcripts for those who, like petitioner, were foreclosed from promptly obtaining a transcript because of their indigence. Petitioner complied with the conditions set forth in Rule 65-1(2), and the only reason that he is now foreclosed from appeal is because he cannot obtain an adequate transcript upon which to premise his appeal, which in turn is caused by the court reporter's death and the illegibility of his notes. But, prescinding from these surface causes of the difficulty, the underlying cause of petitioner's situation is petitioner's indigence coupled with the State's failure in 1941 (or at any time until Mr. Allen's death in 1949) to grant petitioner a means of appeal without regard to his lack of funds. Thus, in the final analysis, the situation presented here was brought about by Illinois' dereliction. Petitioner is blameless; had he been accorded due process

and equal protection of the law in 1941 (or at any time until Mr. Allen's death) he could have had his conviction reviewed, as was his right. Now it is too late. Review of the 1941 trial is forever foreclosed. The only fair solution is to award petitioner a new trial which, if it results in a conviction, may be reviewed in due course.

(4)

The State has failed to distinguish the Eskridge, Westbrook and Patterson cases, and the other authorities on which petitioner relies.

Eskridge v. *Washington*

The State purports to distinguish *Eskridge* v. *Washington State Board*, 357 U.S. 214 (1958), on the ground that "Eskridge, unlike the instant petitioner, exhausted his State remedies before they were barred by lapse of time." (Brief, p. 3.) But the facts of the *Eskridge* case show that Eskridge raised no constitutional contention at the time of his trial. Eskridge, convicted in 1935, immediately applied for a free transcript under a Washington statute which provided that the trial judge could grant a free transcript "if in his opinion justice will thereby be promoted." The trial judge denied the motion. Eskridge then moved in the Washington Supreme Court for a writ of mandate ordering the trial judge to have a transcript furnished for his appeal; this petition and Eskrdige's appeal were dismissed on motion of the state. (357 U.S. at 215.)

Thus, so far as we are able to determine, it was in 1956, after *Griffin*, when Eskridge *for the first time* contended that the failure in 1935 to provide a free transcript violated his federal constitutional rights.

The State is also in error in asserting that petitioner here has not complied with all time conditions imposed by Illinois for appeal. Petitioner applied for a transcript under Rule 65-1(2) well within the permitted period, and he sought writ of error before 20 years elapsed from his conviction, the applicable period under Illinois law at the time. There is no difference in principle between this case and *Eskridge*.

Westbrook v. *Randolph*

The State's attempt to distinguish *U.S. ex rel. Westbrook* v. *Randolph*, 259 F.2d 215 (7th Cir. 1958) is likewise abortive. It is said that "Westbrook 'filed a timely notice of appeal, asking for and receiving several extensions of time, aggregating about eight months in which to file his bill of exceptions' " (Brief, p. 3), and that he "made *timely* claim of a Federal constitutional right to that transcript" (Brief, p. 8).

Notice of appeal is not now and never has been required in Illinois for appeal from a criminal conviction (defendant simply files a praecipe for writ of error, or the record, in the Supreme Court of Illinois*); nor did Westbrook file such a notice (notwithstanding the statement in the opinion of the Court of Appeals to the contrary, 259 F. 2d at 216). Westbrook, like petitioner, sought and received extensions of time within which to have the transcript certified by the trial judge and filed in the trial court (Westbrook's extension was for about 300 days while petitioner's was for 90). Both petitioner and Westbrook were unable to obtain the transcript—Westbrook because the reporter became ill and then lost his notes,** petitioner because he

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* Notice of appeal as an alternative procedure to obtain review in criminal cases was first introduced in Illinois in 1961. (Ch. 38, §769.1, Ill. Rev. Stat. 1961.).

** The Court of Appeals in the *Westbrook* case states that Westbrook "offered to pay for" the trial transcript (259 F.2d at 216). Therefore, the statement in petitioner's opening brief (page 23) that Westbrook was at all times a pauper is in error.

was indigent and could not pay the reporter, and in both cases the time for certification lapsed.

But the important point is this: contrary to the assertion as page 8 of the State's brief, Westbrook did *not* immediately assert a constitutional right to a free transcript; he first advanced this contention in 1952, four years after his conviction (see 259 F.2d at 216).

Thus, at and immediately after his trial, before the time for certification of the transcript expired, Westbrook did no more to obtain a transcript than petitioner except offer to pay the reporter.

After *Griffin,* the Illinois Supreme Court revived the time for certification for Griffin, Westbrook, petitioner, and scores of others. Westbrook never proceeded under Rule 65-1(2) because by 1956 it was known that the shorthand notes of his trial were lost. Petitioner made timely but fruitless efforts to obtain the full transcript of his trial under that rule. There is no sound distinction between the two cases.

Patterson v. *Medberry*

The State has neither referred to nor attempted to distinguish *Patterson, Warden* v. *Medberry,* 290 F.2d 275 (10th Cir. 1961), *certiorari denied,* 368 U.S. 839, *rehearing denied,* 368 U.S. 922 (Nov. 21, 1961), discussed at pages 21 to 23 of petitioner's opening brief.

Other Cases

Also ignored by the State are the *Castle* and *Williams* cases (Petitioner's Brief, pp. 24-26) in which the Supreme Court of Illinois recently approved awarding new trials to indigent defendants who were unable to obtain transcripts for appeal.

Nor does the State advert to the numerous cases from all over the United States (Petitioner's Brief, pp. 26-32) in which courts have granted new trials under the circumstances presented here.

(5)

The State has misstated the ground of the decision of the court below.

At pages 8 and 10 of its brief, the State purports to summarize the ground of the decision below by the Supreme Court of Illinois. At page 8 it is said:

> ". . . Illinois' highest court denied relief in this case, not upon the ground that petitioner would not have been entitled to a free transcript had he made timely claim of a Federal constitutional right to that transcript . . . but upon the ground that, no such application having been made, petitioner's conviction has become final."

And at page 10 the State asserts:

> "It is clear from a reading of the opinion of the Supreme Court of Illinois in the instant case that what that court held and all that it held was that an indigent prisoner who waits many years after his conviction and until long after the death of the court reporter who inscribed these shorthand notes of his trial is not entitled to freedom if the State cannot convict him upon a trial *de novo*."

Petitioner submits that the State has distorted and misstated the holding of the court below. The opinion below is *not* grounded upon petitioner's failure to contend in 1941 that he had a constitutional right to a new trial; the opinion below says *nothing* about waiver of the right to a transcript; it says *nothing* about petitioner's waiting "until long after the death of the court reporter" to apply for a

free transcript; it says *nothing* about the State's inability to "convict [petitioner] upon a trial *de novo*."

The short of the matter is that the Attorney General has advanced a new argument in this Court, and is attempting to show, contrary to the fact, that the court below accepted his argument and disposed of the case on the basis of it.

(6)

The State's discomfort affords no basis for depriving petitioner of his constitutional rights.

The State implies that this Court should reject petitioner's plea for new trial because of the difficulty the State may experience in presenting proof of guilt at this time in this and similar cases. (State's brief, pp. 5, 6, 10.) We submit, to the contrary, that this Court should hold steadfast to the rule that a citizen's rights may not be diluted or denied because the government may be caused inconvenience or embarrassment in recognizing those rights. Perhaps the Court will recall the similar *in terrorem* argument advanced by the Attorney General of Illinois in the *Griffin* case; there he said to this Court (Brief for Respondent, p. 10):

> "The cost of affording typewritten transcriptions of such shorthand notes as are actually taken in the Criminal Court of Cook County and the Circuit Courts of cognate jurisdiction in Illinois' one hundred and one other counties *would alone be prohibitive*. But if petitioners' contention is to be given its necessary full effect, the cost of providing a stenographer to take notes and upon demand transcribe his notes in all of the Illinois courts that have jurisdiction to imprison defendants, either by mandatory sentence of imprisonment or as alternative to the non-payment in whole

> or in part of fines imposed, *will impose a wholly impossible financial burden upon the resources of Illinois.*" (Emphasis added.)

This Court properly disregarded this "practical" contention, and now we find, seven years later, that the system is working smoothly, and, contrary to the Attorney General's dire predictions, Illinois has not been driven into insolvency from the relatively modest typing charges resulting from Rule 65-1. The most significant effect of that rule's operation is the large number of trials which have been found to be infected with error so prejudicial as to require retrial (see Petitioner's Brief, Appendix B, pp. 39-46).

Apropos in the comment on this subject in *Patterson, Warden* v. *Medberry,* 290 F.2d at 278:

> ". . . While it is unfortunate that at this late date the State of Colorado will be confronted with releasing one convicted of murder, or with the difficult but not insurmountable task of retrying him, yet, as said in the *Griffin* case, it is traditional in our system of government that 'constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.'"

Conclusion

Recently, a scholar in the field of federal-state relations in criminal cases has said:

> ". . . The possibilities of error, oversight, arbitrariness and even venality in any human institution are such that subjecting decisions to review of some kind answers a felt need: it would simply go against the grain, today, to make a matter as sensitive as a criminal conviction subject to unchecked determination by a single institution." *Bator*, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441, 453 (1963).

No appellate tribunal can ever determine whether prejudicial error occurred at petitioner's 1941 trial, or whether the State proved a *prima facie* case against petitioner. If the right of appeal is to be afforded to petitioner without regard to his poverty and other circumstances which he did not induce, he must be granted a new trial.

Respectfully submitted,

THOMAS P. SULLIVAN
ROBERT E. PFAFF
135 S. La Salle Street
Chicago 3, Illinois
Attorneys for petitioner,
Willie Norvell

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